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WRITING SAMPLE

This writing sample is the open brief assignment from my Legal Writing and Research class during the Spring 2022 semester. I received the Best Brief award for my small section group and a grade of High Pass for the class. The situation referenced is loosely based on real events.

In this brief, I argued on behalf of the plaintiff in a wrongful termination suit against her former employer. The determinative issue in the case was the meaning of "care" within a specific subsection of the FMLA. I received a copy of the complaint and related exhibits for background information. I received and incorporated some general feedback into this sample, but the writing is entirely my own.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

SHAWNA WRIGHT, *Plaintiff*, vs. ALAMOGORDO AVIARY, INC., *Defendant*.	)	Civil No. 21-3456 (ABC/DEF) **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Defendant Alamogordo Aviary ("Aviary") wrongfully terminated Plaintiff Shawna Wright after she requested leave under the Family Medical Leave Act of 1993 ("FMLA") to care for her father as he underwent serious medical treatment for a rare disease. By denying Wright's request for leave under the FMLA, the Aviary willfully and intentionally interfered with Wright's rights. Wright seeks a judgment against the Aviary under 29 U.S.C. § 2615 for compensation in the amount of earnings she would have received if not for the Aviary and litigation costs.

The motion before the Court concerns the meaning of "care" under 29 U.S.C. § 2612(a)(1)(C). Interpreting "care" consistently with the expressed will of Congress and broader purposes surrounding the FMLA, the term undoubtedly includes Wright's care for her father for the period from September 20, 2021 to October 15, 2021. There is no genuine issue of material fact regarding the definition of "care" within 29 U.S.C. § 2612(a)(1)(C) and thus the Court should grant the Plaintiff's motion for summary judgment.

STANDARD OF REVIEW

Plaintiff is entitled to a summary judgment motion if Plaintiff shows that "there is no genuine dispute as to any material fact and that [Plaintiff] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court shall grant summary judgment "[i]f a reasonable trier of fact could not return a verdict for the nonmoving party." *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Because the purpose of a summary judgment motion is to determine whether a case should proceed to trial, the nonmoving party must at least direct the court to facts which establish a genuine issue for trial. *Id.* The court shall grant the motion and the case shall not proceed to trial if no genuine dispute as to any material fact exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

FACTS

Shawna Wright had been employed by Alamogordo Aviary since 2010. (Compl. ¶¶ 4-5, 7.) She began by working in the gift shop and was later promoted to Animal Technician after becoming a Certified Avian Specialist. (Wright Decl. ¶ 2.) Wright has a passion for animals and sought work at the Aviary so she could have contact with animals. (*Id.*) She performed her job duties satisfactorily during her employment. (Compl. ¶ 8.)

On September 17, 2021, Wright's father, Donald Baker, was diagnosed with Carl-Hardy Syndrome ("CHS"), a rare gastrointestinal disease. (*Id.* ¶ 9.) On the advice of his physicians, Baker made plans to be treated at the Colonel S. Mustard Institute ("Institute") in Las Vegas, Nevada for four weeks. (*Id.* ¶ 11.) Baker's physicians also informed him that CHS becomes highly contagious to other humans during treatment. (*Id.* ¶ 10.) For this reason, treatment facilities typically keep patients in quarantine. (*Id.*) Baker was scheduled to begin receiving treatment on September 20, 2021. (Compl. Ex. 1 at 1.)

Baker and his four-year-old greyhound Comet are a certified therapy dog and handler team. (Compl. ¶ 12.) The pair became certified in March 2019 in order for Baker to take Comet into hospitals to provide care for patients. (*Id.*) Dr. Reginald White, one of Baker's treating physicians, advised Baker that therapy dogs can be beneficial to patients undergoing CHS treatment to ease stress and anxiety. (*Id.* ¶ 13.) CHS is not transmissible to dogs. (*Id.*) Although Dr. Green, another one of Baker's physicians, told Baker that Comet's presence may not be medically necessary, he decided to follow up with the Institute about the issue directly. (Baker Decl. ¶ 5.)

On the same day as his diagnosis, Baker communicated with the Institute about the possibility of bringing Comet to Las Vegas. (Compl. Ex. 1 at 1.) The Institute agreed that therapy dogs can help create the best atmosphere for patients. (*Id.*) However, the Institute also noted that therapy dogs are only permitted from 9:00 a.m. until 5:00 p.m. (*Id.*) Thus Baker would need another certified handler to bring Comet to and from the hospital during treatment. (*Id.*) Later that day, Baker asked his three children if one of them could accompany him to Las Vegas to care for by handling Comet. Wright was the only one available to provide the requested care as Baker sought treatment. (Baker Decl. ¶ 6.) The Institute informed Baker that Wright would need to complete a handler certification program, which typically took one week at its recommended organization. (Compl. Ex. 1 at 1.) However, the Institute made an exception to allow Wright to take Comet back and forth for the first week provided that she obtained the certification during that time. (*Id.* at 2.)

Wright promptly filed an FMLA request with the Aviary for four weeks of unpaid leave on September 19, 2021. (Wright Decl. ¶ 3.) Due to the urgency of the situation, she left for Las Vegas on the first day of her father's treatment, September 20, 2021, before she heard back from

the Aviary. (*Id.*) Wright and Comet completed the handler certification during the first week and Wright took Comet to and from the hospital as planned for the remaining three weeks. (*Id.* ¶ 5.) She would take Comet to her father at 9:00 a.m., pick him up at 12:00 p.m. for a walk and snack, bring him to the pediatric ward to comfort sick children, drop him back off to her father at 1:00 p.m., and then pick him up at 5:00 p.m. (*Id.*) During that time, Wright also took Comet on regular walks and fed him. (*Id.* ¶ 4.) When Wright noticed that Comet was sick, she took him to a local veterinarian. (*Id.*) The veterinarian diagnosed Comet with "kennel cough" and prescribed him antibiotics, which Wright administered until Comet recovered. (*Id.*)

When Wright returned home to New Mexico on October 15, 2021, she found two letters from the Aviary dated September 24, 2021. The letters stated that the Aviary had denied her FMLA request because it believed that Wright's assistance in her father's treatment was not covered under the FMLA. (*Id.* ¶ 7; Compl. ¶ 16-17.) Wright returned to work on Monday October 18, 2021 and was terminated due to excessive unexcused absences. (Wright Decl. ¶ 7; Compl. ¶ 18.)

Now unemployed, Wright applied for an assistant animal technician position at the Tularosa Bird of Prey Rehabilitation Center. (Wright Decl. ¶ 9.) Angela Spears interviewed Wright on November 9, 2021 (*Id.* ¶ 10.) Spears essentially guaranteed Wright the job, but six days later informed Wright she would not offer her the position because she knew about Wright's time in Las Vegas. (*Id.* ¶ 11.) Wright discovered from a former co-worker that Caroline Juniper, Wright's supervisor at the Aviary, had a casual conversation with Spears during which she warned Spears against hiring Wright because she "disappeared for a month to go gambling with her boyfriend" and claimed Wright was a compulsive liar. (*Id.* ¶ 12.)

Baker was released from the Institute following the conclusion of his treatment and, with the help of Comet, Wright, and medical intervention, has been healthy ever since. (Baker Dec. ¶ 8.) Wright, however, is now unemployed and has dim prospects for regaining employment in her field of expertise. Wright now seeks her own recovery so she can be made whole again in the wake of the Aviary's unlawful actions.

ARGUMENT

I. Wright's care for her father is care that is covered by the statute.

The FMLA provides that "an eligible employee shall be entitled to…leave…[i]n order to *care* for the…parent, of the employee, if such…parent has a serious health condition." 29 U.S.C. § 2612(a)(1)(C) (emphasis added). To determine the scope of "care," the Court must examine the ordinary meaning by looking at both the definition and commonplace understanding rather than attempting to limit the significance of such broad terminology.

A. The ordinary meaning of "care" supports a broad interpretation because it is an expansive term.

The term "care" plainly includes the care Wright provided to her father. One of the most fundamental canons of statutory construction is that "words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019). Looking first to the dictionary definition, "to care for" is defined as "to take thought for, provide for, look after, take care." *Care, v.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). By caring for her father through handling Comet, Wright was both providing for and looking after her father's well-being. She cared for her father when he was sick

and could not provide for or look after himself. Furthermore, the definition does not limit the meaning of "care." Thus, "care" was and is likely understood to have a broad meaning.

For the Court to determine the purview of a statute, "[it] must therefore 'look first to its language, giving the words used their ordinary meaning.'" *United States v. Hunt*, 456 F.3d 1255, 1264 (10th Cir. 2006) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). "Care" is not a limiting term. *See generally Ballard v. Chicago Park District*, 741 F.3d 838, 840 (7th Cir. 2014). Rather, it is understood by the general public to include caring for houseplants, caring for one's own personal items or those of another, and caring for an animal or pet. There is no limiting word or provision within the statute, only the general term "care." By caring for Comet, Wright was caring for her father's possession. She was also caring for her father because he needed Comet for his treatment and he could not have cared for Comet himself. The ordinary meaning of "care" on its own is enough to support Wright's position.

B. The definition of "care" is not limited to a restrictive set of circumstances and an interpretation that does limit its meaning could have inadvertent repercussions.

"Care" has not been interpreted strictly as direct care. The Seventh Circuit granted summary judgment to an employee who was terminated after taking leave to care for her daughter with thyroid cancer. *See Gienapp v. Harbor Crest*, 756 F.3d 527, 528-29 (7th Cir. 2014). The court found that § 2612(a)(1)(C) included the Plaintiff caring for her grandchildren while her daughter underwent treatment. *Id.* at 531. Finding that the Plaintiff was entitled to summary judgment on the meaning of "care," the court stated that the FMLA includes psychological as well as physical assistance and that "[a] person who knows that her family is well looked-after has an important resource in trying to recover from a medical challenge." *Id.* at

532. Like the Plaintiff in *Gienapp,* Wright provided both indirect care for her father by caring for Comet and direct care by producing a potential benefit for her father's health. Comet is as important of a presence in Baker's life as any family member and knowing that Comet was well looked-after aided his recovery. The decision in *Gienapp* took into account the breadth of the word "care" and recognized that it is an inclusive rather than selective term.

Courts have generally held that leave will not be granted where care is an incidental consequence of an unprotected activity. *See Leakan v. Highland Cos.*, 1997 U.S. Dist. LEXIS 20381 (E.D. Mich. 1997) (holding that the Plaintiff was not entitled to leave when she took her newborn son on a trip to meet his grandparents); *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005) (holding that the FMLA requires some actual care for the family member and thus the Plaintiff did not qualify for leave when he drove the family car back to Seattle from Atlanta during his wife's difficult pregnancy). Wright's trip to Las Vegas was not incidental to the care for her father, but rather she went to Las Vegas to care for her father by caring for Comet. Any time spent not caring for him directly was incidental to the trip's primary purpose. There is no statutory or regulatory provision or precedent stating the caregiver must provide care during every hour of their leave or that the caregiver is not permitted to enjoy themselves simultaneously. The visit from Wright's fiancé and her alleged gambling are inconsequential and irrelevant to determining the meaning of "care" under § 2612(a)(1)(C).

Interpreting "care" in a narrow sense could lead to unintended consequences. For example, if Wright's care for her father is excluded from FMLA coverage then coverage could be excluded for a mother who takes her suicidal child to attend therapy. The mother's employer could argue that, under the facts of Wright's case, while therapy may be helpful for the child's health, it is not completely medically necessary because mental illness could be handled solely

by a psychiatrist and drug treatment. While not deemed essential to recovery, the therapy sessions do potentially improve the child's outcome. The mother, like Wright, would not be providing direct care to her son, but would be providing ancillary care that could lead to improvement of her child's condition. To protect the interests of future employees in situations analogous to Wright's, the Court should err on the side of caution and interpret the definition broadly.

II. Congress' intent in enacting the FMLA justifies including coverage for Wright.

If the Court finds the ordinary language is ambiguous, it must look to other sources that reveal meaning. As such, it is also important to consider Congress' specific intent in passing the FMLA. During the enactment process, Congress noted that "'care for' . . .is intended to be read *broadly* to include physical and *psychological care*." S. Rep. No. 103-3, at 24 (1993) (emphasis added). Congress went on to remark that adult children can often provide significantly more psychological comfort and reassurance to their sick parent than someone who is not as close to that parent and there may be no one other than the child available to care for the parent. *See Id.* Accordingly, interpreting "care" broadly would align with the expressed will of Congress.

A. Congress intended to include psychological care within the meaning of "care" under 29 U.S.C. § 2612(a)(1)(C).

Congress did not consider the handling of therapy dogs at the time of enactment, but if it had it would have likely found that this type of care is covered under the statute. Wright's handling of Comet was a form of psychological care for her father. Congress recognized that a family member can provide far better psychological comfort for an ill parent, which was Wright's role. Further, Congress specifically included the term "broadly" which implies that the phrase should

be interpreted in the most far-reaching sense. Dr. White's letter confirms that Comet's presence would ease Baker's anxiety and could improve his treatment's success. (Compl. Ex. 3 at 1.) Therefore, handling Comet was both psychological and physical care which helped mend Baker's state of mind and his health related to his treatment.

The defendant may argue that Congress intended "psychological care" to be read within the context of the specific treatment. Hence, the defendant may posit that since Baker was not being treated for mental health reasons, Wright caring for Comet would not be covered under the statute. S. Rep. No. 103-3 at 24. However, there was no such intention that the psychological care has to be the underlying illness or that the phrase should be limited in any way. Even if Congress intended this reading of the statute, Wright provided physical care for her father in addition to psychological care. As noted by Dr. White, Comet's presence could have been critical to Baker's outcome. (Compl. Ex. 3 at 1.) Wright's care for Comet was both psychological and physical care within the meaning of the statute, which Congress intended to cover.

The defendant may also point to appellate decisions that have limited the scope of psychological care covered by the statute. For instance, the Second Circuit held that a visit to an ill parent did not qualify for leave under the FMLA. *Fioto v. Manhattan Woods Enterprises LLC*, 123 F. App'x 26, 28 (2d Cir. 2005) (holding that the employer did not violate the FMLA when it terminated an employee for taking a day off to visit his mother in the hospital while she underwent emergency brain surgery). Unlike the Plaintiff in *Fioto*, Wright did not simply visit her father in the hospital; she took Comet to and from the hospital to improve her father's psychological state and increase his chances of a positive outcome. Unlike Wright, there was no evidence presented in *Fioto* that the Plaintiff secured a letter from his mother's physician stating

that his presence would potentially improve his mother's outcome. Wright obtained a physician's letter confirming that she would be providing valuable assistance to her father, which is not required under the statute. Wright's care was an integral and strategic part of her father's treatment plan.

B. The way Congress structured the FMLA implies that it intended to include Wright's situation.

The FMLA's structure indicates that Wright's care is included within the statute. Section 2612 is titled "Leave requirement" and the subsection under which § 2612(a)(1)(C) falls is titled "Entitlement to leave." Congress wrote this subsection with the intention of outlining what type of leave an employee would be entitled to rather than expressing limitations on leave. While some portions of the section specify limitations as to how the leave may be taken, no portion places limits on an employee's specific actions during the leave period. Hence, when reading the statute, the Court must consider Congress' intention as to that particular subsection of the FMLA. Furthermore, the Court must decide whether the majority voting coalition would have considered that subsection a reason for an employee to be denied leave instead of granted it. The FMLA's structure shows that Congress almost certainly intended "care" under § 2612(a)(1)(C) to be interpreted in a way that expands access to leave as opposed to placing limits on it.

III. Wright's interpretation conforms to the FMLA's purpose.

Congress enacted the FMLA to allow for employees to balance their work with family needs, to promote the stability and economic security of families, and to preserve family integrity. 29 U.S.C. § 2601(b)(1). The emphasis on family values supports including Wright's care for her father within the meaning of the statute. The purpose has subsequently been interpreted by the Department of Labor and courts in a manner consistent with Wright's interpretation. Even if the

Court remains hesitant, it should consider that the employee's interest in caring for their family member is greater than the employer's interest in the uninterrupted presence of the employee.

A. The Department of Labor has adopted a broad understanding of the FMLA.

According to the Department of Labor, the purpose of the FMLA is "to allow employees to balance their work and family life by taking reasonable unpaid leave…for the care of a…parent who has a serious health condition." 29 CFR § 825.101. When Wright requested leave, she was balancing her work and family life because her siblings were unable to care for her father during his treatment. Baker reached out to his closest family members, his children, and may have had to go to great lengths to find an alternative. Thus, only Wright could ensure that her father would receive the best possible care. The defendant may argue that neither Wright nor her father exhausted all possible options before Wright requested leave, but the statute does not require searching for an alternative. The purpose of the FMLA is to allow balance in work and family life and does not state that an employee has to search for another option for care when they are eligible to request leave themselves.

The defendant may argue that Wright's request for leave was not "reasonable." 29 CFR § 825.101. Wright requested four weeks off to spend time caring for her father with a near immediate turn around. However, due to the seriousness of her father's illness, Wright had to make a decision quickly and could not wait for her employer's approval. She only requested the necessary amount of time that would allow her to be present for her father's treatment and did not stay beyond that time. Wright did not request any leave beyond the treatment period, even though she may have been exhausted from caring for him and would have to travel back to resume working. If Wright had waited for approval, her father would have had to prolong receiving treatment and, upon receiving the leave denial, would have experienced a further delay

in finding an alternative caregiver, if any was available. Wright reasonably requested appropriate leave and departed without receiving a response so her father could begin treatment.

Courts have pointed to the Department of Labor interpretation when finding for the employee on the meaning of "care." The Seventh Circuit found that an employer wrongfully terminated its employee for unauthorized unexcused absences when she accompanied her terminally ill mother on a tourist trip to Las Vegas. *Ballard v. Chicago Park District*, 741 F.3d 838, 839 (7th Cir. 2014) (holding that "to care for" included a trip to provide physical and psychological care to a terminally ill parent while that parent is traveling). The *Ballard* court pointed out that the Department of Labor regulations define "care" expansively and without geographic limitation. *Id.* at 841. The defendant may try to distinguish *Ballard* by pointing out that the Plaintiff in that case was already the primary caregiver for her mother, but neither the statute nor the decision requires that the employee be the parent's primary caregiver.

The defendant may also say that *Ballard* discusses "care" in terms of basic needs which would not encompass the need for a therapy dog. *Id.* at 842. However, basic needs include medical, hygienic, or nutritional needs. *Id.* Under that definition, caring for Comet was one of Baker's medical needs. According to Dr. White's note, Comet's presence would potentially improve Baker's treatment outcome. (Compl. Ex. 3 at 1.) When Wright was bringing Comet to the hospital to spend time with Baker, her actions contributed to Baker's treatment and thus his medical care.

B. The broad interpretation of "care" still accounts for employers' interests.

In addition to balancing work and family life, the FMLA is meant to accommodate employers' legitimate interests. 29 U.S.C. § 2601(b)(3). Congress accounted for employers' interests during enactment and found that leave policies are generally cost-effective for

employers. *See* S. Rep. No. 103-3, at 12-14 (1993). The defendant may say that the Aviary's specific interests outweighed Wright's desire to balance her responsibilities, but the Aviary has presented no evidence that Wright's absence greatly impacted its operations. Moreover, employers' legitimate interests must be taken into consideration with the employee in mind. Given the seriousness of Baker's illness and the chances that Comet's presence would improve his outcome, the Aviary's interest did not outweigh Wright's need to care for her father.

The defendant may also present examples of decisions finding in favor of the employer when the care provided was not completely necessary. The First Circuit held that a spiritual healing pilgrimage did not comprise medical care under the FMLA. *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 791 (1st Cir. 2011). Citing *Tayag*, the defendant may say that any care not completely necessary would not be covered. However, Wright's claim is distinguishable from *Tayag* because that decision was limited to healing pilgrimages, which is a circumstance distinct from incorporating therapy dogs into treatment. Furthermore, Comet's presence was part of Baker's treatment and hence completely necessary.

C. When there are competing interests, courts should interpret in favor of the employee.

If there is still uncertainty as to whether "care" encompasses Wright's situation, the Court should consider which party is in a better position to accommodate each side's interests under the circumstances. A serious illness affects the entire family, not just the sick individual. *See* S. Rep. No. 103-3, at 10 (1993). Negative effects on a caregiver, for example not being able to take off work to care for their ill family member, can lead to worse health outcomes. Eve Wittenberg & Lisa A. Prosser, *Health as a Family Affair*, New England Journal of Medicine, May 12, 2016. If Wright had not taken off work to care for her father, there is reason to believe that Baker

would not have fared as well as he did. If Baker did not fare as well, then it's possible Wright would have had to request subsequent leave to care for him in his worsened state. It is more important and consequential that an employee be allowed to request leave from work so their family member can have a better chance of becoming healthy.

The defendant may point out that absenteeism can be costly as well. The CDC estimates that absenteeism costs employers $225.8 billion annually. Claire Stinson, *Worker Illness and Injury Costs U.S. Employers $225.8 Billion Annually*, CDC Foundation, Jan. 28, 2015. Hence employers have a significant interest in ensuring that its employees are present. Even with the significant costs of absenteeism, employers are still in a better position to compensate for the employee's absence than an employee is to find an alternative for their family member's care. A business should be able to account for regular and unexpected absences of employees when considering its operational costs and, if necessary, cut costs elsewhere. Putting the burden on the employee could also greatly increase their level of stress and lead to less than optimal performance at work, which could similarly increase business expenses. Additionally, the loss per employee is estimated at $1,685 per year. *Id.* It would have certainly cost Wright and her father more than $1,685 to find an alternative handler for Comet, complete the certification, and employ them for four weeks with lodging. Simply put, the harm to the employee is greater than the harm to the employer.

CONCLUSION

In light of the evidence in favor of Wright's position, the Court should interpret "care" under 29 U.S.C. § 2612(a)(1)(C) in the broadest possible sense to incorporate Wright caring for her father during the period from September 20, 2021 to October 15, 2021. The statutory text,

congressional intent, and legislative purpose compel the Court to interpret the term broadly. Thus, the Court should grant the Plaintiff's motion for summary judgment.

Applicant Details

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Contact Phone Number	**858 395 3449**

Applicant Education

BA/BS From	**Loyola Marymount University**
Date of BA/BS	**May 2021**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 15, 2023

The Honorable Jamar K. Walker

U.S. District Court for the Eastern District of Virginia

Walter E. Hoffman U.S. Courthouse

600 Granby Street

Norfolk, VA 23510

Dear Judge Walker:

I am a law student at The George Washington University Law School (GWU), and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024 term. I am enclosing a resume, writing samples, and my law school transcript. Enclosed as well are recommendations from Rami Sibay, Paul Crane, and Connor Mullin. Thank you for your consideration.

Sincerely,

Miles Coll

MILES COLL

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EDUCATION

The George Washington University Law School — Washington, D.C.
Transfer Student, Juris Doctor Candidate — May 2024

- Activities: Van Vleck Moot Court
- Clubs: Antitrust Law Association (ALA); Anti-Corruption & Compliance Association (ACCA); Banking and Securities Law Society (BaSL)

American University Washington College of Law — Washington, D.C.
GPA: 3.48 — Attended, August 2021 - May 2022

- Finished in the top third of my class
- Graded onto the Administrative Law Review (ALR), the official journal of the American Bar Association

Loyola Marymount University — Los Angeles, CA
Bachelor of Arts in Political Science — May 2020

EXPERIENCE

U.S. Department of Justice (DOJ), Criminal Division (CRM), Public Integrity Section (PIN) — Washington, D.C.
Intern — Fall 2023

Judge Lydia Kay Griggsby, U.S. District Court of Maryland — Greenbelt, MD
Intern — May 2023 – August 2023

- Drafting opinions on civil procedure and contract questions unaddressed by the 4th Circuit
- Dissecting opinions and reviewing dockets with Judge Griggsby

U.S. Attorney for the District of Columbia (USADC), Criminal Division, Federal Major Crimes Section — Washington, D.C.
Intern — January 2023 – April 2023

- Drafted court-ready filings including sentencing memos and plea offers
- Researched novel legal issues arising out of USADC's unique jurisdiction as the only Office with both federal *and* local prosecutorial authority
- Participated in weekly debriefs with the entire Section

U.S. Department of Justice (DOJ), Tax Division (TAX), Civil Appeals Section — Washington, D.C.
Intern — September 2022 – December 2022

- Drafted briefs for upcoming cases in the D.C. Circuit Court of Appeals
- Researched case law and highly technical IRC provisions
- Mooted with attorneys who were preparing for upcoming oral arguments

American University Washington College of Law — Washington, D.C.
Research Assistant, Prof. Susan Carle — May 2022 – August 2022
Criminal Justice Clinic, American University Washington College of Law — Washington, D.C.
Dean's Fellow — May 2022 – August 2022

SKILLS AND INTERESTS

Enjoy running, physical fitness and San Diego sports fandom. Have done extensive travel through Europe and North America; parts of Southeast Asia and Latin America.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Date Issued: 03-JUN-2023

Record of: Miles A Coll

Page: 1

Student Level: Law
Admit Term: Fall 2022

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REFNUM:5416357

Current College(s):Law School
Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2021-2022	American University		
LAW 6202	Contracts	4.00	TR
LAW 6206	Torts	4.00	TR
LAW 6208	Property	4.00	TR
LAW 6210	Criminal Law	3.00	TR
LAW 6212	Civil Procedure	4.00	TR
LAW 6214	Constitutional Law I	4.00	TR
LAW 6216	Fundamentals Of Lawyering I	2.00	TR
LAW 6217	Fundamentals Of Lawyering II	2.00	TR
LAW 6470	Intellectual Property	2.00	TR
Transfer Hrs: 29.00			
Total Transfer Hrs: 29.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2022			
Law School			
Law			
LAW 6209	Legislation And Regulation Dooling	3.00	B+
LAW 6250	Corporations Roth	4.00	B+
LAW 6402	Antitrust Law Longwell	3.00	A-
LAW 6644	Moot Court - Van Vleck	1.00	CR
LAW 6668	Field Placement Mccoy	2.00	CR
LAW 6672	The Art Of Lawyering Simeone	2.00	B
Ehrs 15.00	GPA-Hrs 12.00	GPA	3.361
CUM 15.00	GPA-Hrs 12.00	GPA	3.361
Good Standing			
Spring 2023			
Law School			
Law			
LAW 6252	Securities Regulation	3.00	A-
LAW 6290	Banking Law	2.00	B
LAW 6360	Criminal Procedure	4.00	B-
LAW 6362	Adjudicatory Criminal Pro.	3.00	B+
LAW 6478	Licensing Ip Rights	2.00	B+
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	1.00	CR
Ehrs 15.00	GPA-Hrs 14.00	GPA	3.167
CUM 30.00	GPA-Hrs 26.00	GPA	3.256
Good Standing			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Summer 2023			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
Credits In Progress:		2.00	
Fall 2023			
LAW 6232	Federal Courts	3.00	----------
LAW 6256	Mergers And Acquisitions	2.00	----------
LAW 6264	Securities Law Seminar	2.00	----------
LAW 6363	Role Of The Federal Prosecutor	2.00	----------
LAW 6382	First Amendment - Speech/Press	3.00	----------
LAW 6521	International Money Laundering	3.00	----------
Credits In Progress:		15.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	30.00	26.00	84.67	3.256
TOTAL NON-GW HOURS	29.00	0.00	0.00	0.00
OVERALL	59.00	26.00	84.67	3.256

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

COLL MILES A 5224772 10/31

06/08/22 1 OF 1

FALL 2021

LAW-501	CIVIL PROCEDURE	04.00	A-	14.80
LAW-504	CONTRACTS	04.00	A-	14.80
LAW-516	LEGAL RESEARCH & WRITING I	02.00	B	06.00
LAW-522	TORTS	04.00	A-	14.80

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 50.40QP 3.60GPA

SPRING 2022

LAW-503	CONSTITUTIONAL LAW	04.00	B+	13.20
LAW-507	CRIMINAL LAW	03.00	A-	11.10
LAW-517	LEGAL RESEARCH & WRITING II	02.00	B+	06.60
LAW-518	PROPERTY	04.00	B+	13.20
LAW-670	INTELLECTUAL PROPERTY LAW	02.00	B+	06.60

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 50.70QP 3.38GPA

LAW CUM SUM: 29.00HRS ATT 29.00HRS ERND 101.10QP 3.48GPA

END OF TRANSCRIPT

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Miles Coll for a clerkship in your Chambers. I am currently an attorney in the Appellate Section of the Criminal Division of the Department of Justice, and I had the pleasure of having Miles as a student in my Criminal Adjudication course at George Washington University, where I serve as an adjunct law professor. I believe Miles would be a great addition to your Chambers.

Let me begin with Miles's greatest strengths: his willingness to learn, ask questions, and work hard. Based on my observations during class and in discussions with him outside of class, Miles struck me as a very earnest, dedicated, and committed student. He is especially interested in public service and has demonstrated significant initiative in pursuing those dreams. In addition, he consistently asked thoughtful and thought-provoking questions during class, was always respectful during class discussion, and remained open-minded and eager to learn. I think Miles would thrive discussing cases with his fellow law clerks and would mesh well with everyone in and around Chambers.

Miles performed well on my exam, receiving a B+ in a class of about 30 students full of high achievers. Despite challenging time constraints, his answers correctly identified the core issues, accurately analyzed the main legal claims, and was not unnecessarily distracted by red herrings or superfluous explanation. I have no doubt that Miles will only continue to improve as he sharpens his legal skills through various internships and externships.

I hope you will give Miles a close look, as I think he would make a great law clerk. If there is anything I can do to further aid your decision-making process, please do not hesitate to let me know.

Sincerely,

Paul T. Crane

Professorial Lecturer in Law
The George Washington University Law School
ptcrane@law.gwu.edu
434-825-7677 (cell)

June 13, 2023

Dear Judge:

I am writing to sing the praises of Miles Coll, who interned with us in the Spring of 2023 at the U.S. Attorney's Office. He worked in the Federal Major Crimes section of our Criminal Division, where I serve as an AUSA (and intern coordinator). His research and writing abilities were the strongest of any intern in my four years in the office. He produced polished and compelling written work product that would have been good for a young lawyer, let alone a law student, on complicated areas of law from conspiracy to obstruction. Miles is detail-oriented, diligent, and professional. He was always eager to learn, ask questions, and come to court. His inside knowledge of the workings of federal court will give him a leg up on other candidates.

Before joining the U.S. Attorney's Office, I practiced for a decade at Akin Gump. I serve as an Adjunct Professor at Georgetown Law. I can say without reservation that Miles is the sort of candidate we looked for at the firm, in government service, and in class. He will be an asset to your chambers. We were lucky to have him.

Sincerely,

Connor Mullin

Assistant U.S. Attorney for the District of Columbia

Adjunct Professor, Georgetown Law

Connor Mullin - Connor.Mullin@usdoj.gov

The following is a statement of facts I drafted while working at the Department of Justice's Tax Division, in the Appellate Section. The draft was later used in a brief that was submitted in the US Court of Appeals for the Second Circuit. The Department would only permit me to use the sample if I redacted the petitioning taxpayers' names.

The issue on appeal was whether dismissal was categorically justified if an IRS officer improperly referred a taxpayer to the Justice Department while the same taxpayer's installment offer was still pending. The Eastern District of New York concluded that an improper referral did not necessarily preclude a case from moving forward.

STATEMENT OF THE CASE

A. Background

1. Taxpayers' original joint-filing and the Treasury Department's liability assessment

On October 15, 2008, John Doe and Jane Doe ("Taxpayers") filed their 2007 joint income tax return, reporting a $91,945.00 tax liability. *See* Doc. No. 32 at 53; *also see* Doc. No. 1 at 6 (providing all of the assessments made against Taxpayers between 2008 and 2016). However, Taxpayers did not pay the tax reported on the return. *See id.* On November 3, 2008, the Secretary of the Treasury Department ("Treasury") delegated an Internal Revenue Service ("IRS") representative to make an assessment against Taxpayers for federal income taxes, penalties, and interest. *See* Doc. No. 32 at 54. The delegate concluded Taxpayers owed $112,324.18. *See id.*

After the assessment, Taxpayers did not submit anything to the IRS for nearly ten years. *See id.*

2. Taxpayers' reemergence in 2017

On December 7, 2017, Taxpayers submitted an installment agreement request under 26 U.S.C. § 6159. *See id.* Taxpayers proposed paying $361 a month. *See id.* That same day, two transactions

appeared in Taxpayers' IRS accounts. *See id* at 55. One of the transactions mistakenly said Taxpayers' proposal was "granted and active."[1] *See id*. However, the IRS never sent Taxpayers a written notice accepting Taxpayers' settlement agreement proposal. *See id*. Still, Taxpayers proceeded to make six voluntary $361 payments. *See id*. In August 2018, Taxpayers stopped making payments after an IRS officer visited Taxpayers at their home.[2] *See* Doc. No. 32 at 54.

At some unclear time late in 2018, but before October 30, 2018, the IRS referred Taxpayers' case to the Department of Justice ("DOJ"). *See id*. It *is* clear, though, that on September 14, 2018, an entry appeared on Taxpayers' IRS account, stating, "Legal suit pending." *See id*. Moreover, an IRS form dated September 19, 2018 and titled "Request for Installment Agreement – Independent Review Prior to Rejection," suggested the IRS was rejecting Taxpayers' proposal. *See id*.

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[1] The first transaction stated, "Request for installment agreement pending"; the second transaction stated "Installment agreement granted and active." *Id*.

[2] The IRS Officer also left the Taxpayers written note stating, "Levy. Suit to Reduce Claim to Judgment. In process." *See id*; Doc. No. 23 at 27.

Finally, on October 30, 2018, the IRS sent Taxpayers a letter formally rejecting their request for an installment agreement.[3] *See id*.

The letter also informed Taxpayers they only had until November 29, 2018 to appeal the rejection. *See id*. Taxpayers failed to appeal. *See* Doc No. 32 at 55.

B. The suit to reduce the federal income tax liabilities to judgment

On November 30, 2018, the Government brought suit in the District Court for the Eastern District of New York, seeking to reduce the taxpayers' 2007 federal income tax liabilities to judgment. *See id*; Doc. No. 1 at 5-7. Both parties moved for summary judgment, with Taxpayers asserting that the Government's collection action was barred because the IRS improperly referred their case to the DOJ before the taxpayers' request was formally rejected on October 30, 2018. *See* Doc. No. 32 at 56; Doc. No. 26 at 7-11. The District Court granted summary judgment to the Government, holding that the IRS' referral while

[3] For more on the IRS' justification for denying the taxpayers' proposal and why, " 'in the alternative …' the October 30 letter constituted 'a formal notice,'" *see id*; Doc. No 23 at 29.

Taxpayers' installment agreement request was pending did not bar the Government's action. *See id* at 63.

Specifically, the District Court concluded that 26 U.S.C. § 6331(k) was only concerned with, "the timing of the *commencement of a court proceeding*, not the timing of the referral itself." *Id* at 60, *also see* 63 (emphasis added). Taxpayers argued that 26 C.F.R. § 301.6331-4(b)(2) unambiguously prohibited the IRS from making commencement referrals to the DOJ before the IRS notified taxpayers with a formal rejection. *See id* at 59; *also see* Doc. No. 14-1 at 21. The District Court disagreed, emphasizing that the dispute did not hinge on whether the "IRS's referral of the action to the DOJ was untimely," but instead asked "whether the IRS's concededly premature referral serves to bar this suit." Doc. No. 32 at 60.

Carrying out this inquiry, the District Court held that Taxpayers failed to establish that 26 C.F.R. § 301.6331-4(b)(2) expressly proscribed *per se* liability under 26 U.S.C. § 6331(k). *See id* at 61, 63. The Court explained that regulations, "may not serve to modify a statute," and instead "must … be viewed 'in the context of the statute they are designed to explicate.'" *Id* at 60-61 (citing *Koshland v. Helvering*, 298

U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268 (1936)); (citing *Iglesias v. United States*, 848 F.2d 362, 367 (2d. Cir. 1988)). Yet, the Court noted, 26 U.S.C. § 6331(k) "makes no [express] mention of IRS referrals." *Id* at 61; *also see* 63. Necessarily then, by contending that § 301.6331-4(b)(2) barred collection actions "exclusively because of … technical, nonprejudicial [errors] on the part of the government," Taxpayers were asking the Court to "add to the statute 'something which is not there.'" *Id* at 61 (citing *United States v. Calamaro*, 354 U.S. 351, 359, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957)).

The Court also held that Taxpayers' strict reading of § 301.63314(b)(2) went against "the overarching statutory context" of 26 U.S.C. § 6331(k)'s passage. *Id* at 63. Taxpayers asked the Court to interpret § 301.6331-4(b)(2) as a bar on *all* collection cases improperly referred to the DOJ by the IRS before Taxpayers received a formal rejection. *See id* at 62; *also see* Doc. No. 26 at 41, 49-50. Yet Congress passed 26 U.S.C. § 6331(k) solely to ensure taxpayers who took "affirmative steps to satisfy their outstanding tax liabilities [were] entitled to robust, procedural safeguards prior to IRS action." Doc. No. 32 at 62. In this case, however, "the IRS's premature referral did not practically deprive

[Taxpayers] of any such safeguards."[4] *Id*. Therefore, Taxpayers' construction of § 301.6331-4(b)(2) was "plainly 'out of harmony with'" the statutory context of 26 U.S.C. § 6331(k)'s passage. *Id*.

Thus, the Court denied Taxpayers' motion for summary judgment. Doc. *See id* at 63. The Court ruled that Taxpayers failed to materially dispute the Government's contention that 26 U.S.C. § 6331(k) only concerned the timing of levies, and therefore failed to establish that the IRS's premature referral barred the Government's action. *See id*. Since both motions were solely disputing the scope of 26 U.S.C. § 6331(k), the Court entered judgment in favor of the Government.[5] *See* Doc. No. 32 at 63. On June 2, 2022, the Court officially filed its order granting judgment, entering $112,324.18 for the government, plus statutory

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[4] For a more complete examination of the safeguards afforded to the Taxpayers, *see id* at 53 (emphasizing that the proposal was "indisputably reviewed"; the Taxpayers received a "detailed, written notice"; the Taxpayers were given "30 [extra] days to appeal"; and, "most critically," the Taxpayers did not appeal "until after the … window expired and levy was no longer prohibited.")

[5] For more on the issues that were left uncontested, *see id* at 61 (noting that Taxpayers "did not contest [the Government's] stated rationale" for the action, nor that they "suffered any harm" from the IRS's premature referral); *also see* Doc. No. 26 at 47-51.

additions and interest accruing from and after September 30, 2020. Doc. No. 33 at 64.

C. Taxpayers' Notice of Appeal

On July 19, 2022, Taxpayers filed a Notice of Appeal in the U.S. Court of Appeals for the Second Circuit. *See* Doc. No. 34 at 59. Taxpayers seek to reverse the District Court's denial of their Motion for Summary Judgment. *See id*.

The following is a memo I recently drafted in the U.S. Attorney's Office for the District of Columbia (USADC). At the time, the Government was charging the defendant with a separate crime, and holding the defendant's properly-seized phone as potential evidence. However, some time before trial, the Government learned the defendant attempted to erase the phone's information from a remote location. The Government could clearly charge the defendant with obstruction of justice under D.C. law. However, because of D.C.'s unique jurisdiction, I researched whether the Government *could also* charge the defendant with *federal* obstruction of justice.

The case law I found was limited, but on-point. I am including this sample because the USAA supervising the assignment told me he was extremely impressed with the work, and suggested I include it in future applications. The memo has not been edited by anyone else.

To: Paul Courtney

From: Miles Coll

Date: February 16, 2023

MEMORANDUM

I. Issue

Whether the government may charge a defendant with *federal* obstruction for interfering with a *state*-issued subpoena, even if the defendant did not have knowledge of the ongoing *federal* investigation?

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II. Synopsis

Unlikely. The United States District Court for the District of Columbia has held that the D.C. Superior Court is not a "court of the United States" under 18 U.S.C. § 1503. *United States v. Smith*, 729 F. Supp at 1385 (D.D.C. 1990) (citing *United States v. Regina*, 504 F. Supp. at 629, 631 (D. Md. 1980) (holding that the D.C. Superior Court was not a "court of the United States" under § 1503)). Moreover, the D.C. District Court held that § 1503's specific prohibitions limited the entire statute, including § 1503's catch-all provision in the second clause. *Id.* at 1382 – 83. Therefore, the Court held that an individual may only be charged under § 1503 if the defendant has the specific intent to obstruct a federal proceeding. *See id*.

III. Analysis

In *Smith*, the D.C. Metropolitan Police Department ("MPD") set up a series of sting operations, after investigating complaints that an officer ("the defendant") was "skim[ing]"

seized drugs and money during arrests. 729 F. Supp at 1381. During the second sting, the defendant seized 18 packets of government-manufactured cocaine while arresting an undercover MPD officer. *Id*. The defendant confirmed MPD's suspicions when he only turned in 15 of the 18 packets. *Id*. On this basis, the government charged the defendant with obstruction of justice under 18 U.S.C. § 1503 (along with two local charges). *Id*. at 1382. Specifically, the defendant was federally charged with "endeavor[ing] to … impede … the due administration of justice by breaching his duty as a police officer when he intentionally failed to preserve property that he had lawfully seized." *Id*. at 1383.

Under § 1503, an individual may be punished for obstruction of justice if the individual "corruptly … endeavors to … impede any … officer in or of any court of the United States … or officer who may be serving at any … proceeding … in the discharge of his duty … or corruptly … impedes, or endeavors to … impede, the due administration of justice." 18 U.S.C. § 1503. The Court separated the statute into "its two operative parts: 1) the specific prohibitions against endeavoring to … impede any … officer; and 2) the so-called 'omnibus' or 'catch-all' clause, prohibiting any endeavor to … impede 'the due administration of justice.'" *Smith*, 729 F. Supp at 1382 – 83.

The government contended that § 1503 did not carry an actual knowledge-requirement. *See id*. at 1385. The government conceded that the D.C. Superior Court did not satisfy § 1503's "court of the United States"-element. *Id*. (citing *Regina*, 504 F.Supp. at 629, 630).[1] However, § 1503's "judicial … proceeding"-requirement, the government argued, *only* limited § 1503's first clause, *rather than* the entire statute. *See id*. at 1383. Thus, the government could *also* seek a § 1503 conviction by showing the defendant "endeavor[ed] to … impede, the due administration of

[1] By leaving the government's concession undisputed, the Court also implicitly assumed *Regina* as the relevant precedent.

justice [*anywhere*]," *even if* the government could not show the defendant actually knew the specific, already-pending "proceeding" he was obstructing. *See id*. On this basis, that the defendant only knew the cocaine packets would be evidentiarily submitted in Superior Court at the time of the obstruction was irrelevant. *See id*. Instead, the government could meet its burden merely by showing the defendant's intent to obstruct *any* proceeding. *See id*.

The defendant argued that § 1503's "judicial … proceeding"-requirement limited the *entire* statute, and therefore not only burdened the government with establishing the defendant's general intent to obstruct, *but also* with establishing that the defendant *knowingly* obstructed some *specific*, *already-pending* proceeding. *Id.* at 1385. Based on the government's concession, the defendant argued the government could not meet that burden. *See id*. Since the three missing cocaine packets were initially only going to be evidentiarily submitted in a Superior Court proceeding, necessarily then, the defendant could only have *knowingly* obstructed a Superior Court proceeding (rather then *also* knowingly have obstructed a *District Court* proceeding). *See id.* Thus, the defendant could not have specifically intended to obstruct a § 1503 proceeding, because the defendant only knew he was obstructing a proceeding in a court that was not recognized by § 1503. *See id*.

The District Court rejected the government's § 1503 interpretation of the "judicial … proceeding"-requirement, and concluded it limited the entire statute, including the "endeavor[ed] to … impede, the due administration of justice"-provision. *See id*. (citing *United States v. Capo*, 791 F.2d 1054, 1070 (2nd Cir. 1986) (holding that "To obtain a conviction under this section, the government must show that there was a pending judicial proceeding … and the defendant knew of and sought to influence, impede or obstruct the judicial proceeding")). The Court emphasized that "[pending] judicial proceedings … at the time of [the] defendant's conduct is … a *sine qua*

non of a charge under Section 1503." *Id*. at 1385. Since the government couldn't establish the defendant intentionally obstructed a federal proceeding, the court dismissed the defendant's federal charge. *Id*. at 1387.

Applicant Details

First Name	**William**
Middle Initial	**Seth**
Last Name	**Cook**
Citizenship Status	**U. S. Citizen**
Email Address	**wscook@utexas.edu**
Address	**Address** Street **7004 Colony Park Dr** City **Austin** State/Territory **Texas** Zip **78724**
Contact Phone Number	**8177130574**

Applicant Education

BA/BS From	**University of Arkansas-Fayetteville**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 6, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Texas Review of Litigation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience **Appellate, Death Penalty, Habeas**

Recommenders

Sager, Lawrence
lsager@law.utexas.edu
512-232-1322
Steiker, Jordan
jsteiker@law.utexas.edu
512-232-1346
Davis, Hon. Tony
Judge_Tony_Davis@txwb.uscourts.gov
Bernell, Ben
ben.bernell@pillsburylaw.com
5125809631

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William "Seth" Cook

(817) 713-0574 | wscook@utexas.edu | 7004 Colony Park Dr. Austin, Texas 78724

March 26th, 2023

The Honorable Judge Jamar Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

Enclosed, please find my application for a clerkship in your chambers for the 2024-2025 term. I am a 3L at the University of Texas School of Law, graduating in May 2023. After graduation, I will clerk for Justice Debra H. Lehrmann on the Supreme Court of Texas. I am especially interested in your clerkship for several reasons. First, my wife's brother lives in the Virginia Beach area which initially led to my interest in clerking on the Eastern District of Virginia.

Second, this past semester I worked for Texas Law's Capital Punishment Clinic, representing a man named Tracy Beatty. After meeting Mr. Beatty on Texas's death row, a shift occurred in my career outlook. I realized that the patent and antitrust litigation I had done the previous summer would not provide the same meaning as my work for Mr. Beatty. In about two months, I worked on a state habeas petition, drafted significant portions of a Fifth Circuit brief, conducted juror and witness interviews, and researched arguments for a cert petition. Unfortunately, in November, Mr. Beatty was executed despite being denied sufficient IQ or mental health testing. While this was devastating, knowing that our work reassured him of his humanity and inherent dignity in his last few months meant that our work was far from meaningless.

While death penalty work can be discouraging, this clinic is unquestionably the most meaningful thing I have ever done. A major career goal of mine is now to work in criminal defense. Because the Supreme Court of Texas has a solely civil docket, I am interested in clerking in the federal system for a judge with significant criminal practice experience. While many clerkships would be invaluable for this goal, your experience in the U.S. Attorney's Office and your reputation for integrity and public service, confirm my desire to clerk in your chambers.

My application includes my resume, transcript, writing sample, and three professional references. These references may be reached as follows:

- Jordan M. Steiker, Professor of Law, University of Texas School of Law
  jsteiker@law.utexas.edu; (512) 680-4709

- Lawrence G. Sager, Professor of Law, University of Texas School of Law
  lsager@law.utexas.edu; (512) 698-6842

- Ben Bernell, Partner, Pillsbury, Winthrop, Shaw & Pittman LLP
  Ben.bernell@pillsburylaw.com; (512) 580-9631

Respectfully,

Seth Cook

William "Seth" Cook

wscook@utexas.edu | 7004 Colony Park Dr. Austin, Texas 78724 | (817) 713-0574

EDUCATION

The University of Texas School of Law, Austin, Texas
J.D. expected May 2023
GPA: 3.63

- *Chief Symposium Editor*, THE REVIEW OF LITIGATION, Vol. 42, 2022 – 2023
- *Research Assistant*, Professor Lawrence G. Sager
- *Student Attorney*, Capital Punishment Clinic (Fall 2022 – Spring 2023)
- *Recipient*, Chief Justice Joe R. Greenhill Presidential Scholarship in Law

University of Arkansas, Fulbright College of Arts and Sciences, Fayetteville, Arkansas
B.A. in Political Science, May 2019

- Senior Thesis: "*The Developing Impact of Twitter on Presidential Campaign Discourse"*
- Pi Sigma Alpha, Political Science Honor Society
- Dean's List, 2017-2019
- Chancellor's List, 2018-2019

PUBLICATIONS

- *Standing for the Lorax: Augmenting an Ill-Suited Standing Doctrine to Allow for Justice in Novel Climate Change Litigation*, 41 REV. OF LITIG. 409 (2022).
    - Winner, Best Student Note Award, THE REVIEW OF LITIGATION, Vol. 41.
- *Protecting the Most Vulnerable: Pursuing a Clear and Functional Equal Protection Framework for Transgender Youth*, 28 TEX. J. C.L. & C.R. (forthcoming 2023).
    - Presenter, TEXAS JOURNAL OF CIVIL LIBERTIES & CIVIL RIGHTS 2023 Symposium: *Legal Issues Impacting the LGBTQIA+ Community*.

EXPERIENCE

The Honorable Debra H. Lehrmann, Senior Associate Justice
The Supreme Court of Texas, Austin, Texas
Judicial Law Clerk, September 2023 – 2024 (expected)

Pillsbury Winthrop Shaw & Pittman LLP, Austin, Texas
Summer Associate, May 2022 – July 2022

- Edited and drafted briefs on antitrust and patent issues in district and appellate courts.
- Supported attorneys in pro bono representation with the Mid-Atlantic Innocence Project.

The Honorable Tony Davis, U.S. Bankruptcy Judge
U.S. Bankruptcy Court for the Western District of Texas, Austin, Texas
Judicial Intern, July 2021 – August 2021

- Drafted bench memos, orders, judgments, and an opinion.
- Analyzed confirmation requirements under the newly amended Chapter 11 proceedings.

Harris County District Attorney's Office, Human Trafficking Division, Houston, Texas
Law Clerk, June 2021 – July 2021

- Aided ADAs in trial preparation, including voir dire and witness interviews.
- Wrote memorandum on Faretta Hearings and synthesized evidence into writing.

INTERESTS

- Playing pick-up basketball, writing music and poetry, and studying theology.

Prepared on February 10th, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

JD

OFFICIAL NAME: COOK, WILLIAM SETH
PREFERRED NAME: Cook, William S.

ADMIT: 08-26-2020

TOTAL HOURS CREDIT: 73.00
CUMULATIVE GPA: 3.63

FAL 2020	423	CRIMINAL LAW I		4.0	A- JEL
	427	TORTS		4.0	B+ TOM
	531	PROPERTY-WB		5.0	C+ JSD
	332R	LEGAL ANALYSIS AND COMM		3.0	B+ ECD
SPR 2021	433	CIVIL PROCEDURE-WB		4.0	B+ RGB
	434	CONSTITUTIONAL LAW I-WB		4.0	A- LGS
	421	CONTRACTS		4.0	A OB
	232S	PERSUASIVE WRTG AND ADV		2.0	B+ SJP
FAL 2021	397S	SMNR: COLLOQ CMPLX LITI		3.0	A LAB
	387W	APPELLATE ADVOCACY		3.0	A- RMR
	381C	CNST LAW II: RACE/SEX D		3.0	A JMS
	392P	ANTITRUST		3.0	A ALW
	397S	SMNR: ENV IMPCT ENRGY D		3.0	A+ DGN
SPR 2022	397S	SMNR: MERCY		3.0	A- LK
	483	EVIDENCE		4.0	A- SJG
	385	PROFESSIONAL RESPONSIBI		3.0	A- JSD
	386V	PATENT LITIGATION		3.0	B+ CJH
	397L	DIRECTED RESEARCH AND S		3.0	A LGS
FAL 2022	383F	CAPITAL PUNISHMENT		3.0	A JMS
	284W	ADV LGL WR: APPEALS	P/F	2.0	CR KO
	497C	CLINIC: CAPITAL PUNISHM	P/F	4.0	CR TJP
	393H	CNSMR PROT: DECPT TRD P		3.0	A FAD
SPR 2023	383G	CAPITAL PUNISHMENT: ADV		3.0	
	284Q	APPELLATE CLERKSHIP WRI	P/F	2.0	
	486	FEDERAL COURTS		4.0	
	397S	SMNR: SUPREME COURT		3.0	
	197W	CLINIC, ADVANCED	P/F	1.0	

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2020	16.00	16.00	16.00	3.09
SPR 2021	30.00	30.00	30.00	3.61
FAL 2021	45.00	45.00	45.00	4.00
SPR 2022	61.00	61.00	61.00	3.68
FAL 2022	73.00	73.00	67.00	4.00
SPR 2023	73.00	73.00	67.00	0.00

01-20-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

March 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in warm support of Seth Cook, who has applied to be your law clerk. Seth's formal name is William, but I and others in the UT Law environment have known him as Seth; so I will continue with that name.

I first encountered Seth in my Con Law 1 class, which was on-line on account of Covid. After several post-course meetings, I asked him to act as one of my research assistants. In this past semester I directed a research project of his, on the constitutional approach to discrimination against members of the LGBTQ community. So I have seen Seth and his work in a variety of contexts.

For all of that, I am going to begin by referencing Seth's transcript and CV, because they suggest things about him that are fully borne out by my experience. Seth's grades begin a bit flat, and then swoop up to excellence. And Seth's CV paints a rough sketch of a person with political interests and concerns, but with a willingness and commitment to work hard towards his professional and political goals. This picture of a hard worker, digging at his projects, and succeeding brilliantly, tracks my experience with Seth perfectly.

Seth is intellectually gifted but modest and anxious to learn. Law school has been a tonic for him. As his studies have progressed, he has grown more sophisticated and confident. His directed research project serves as a good example of his evolving strength, underlying diligence, and ability to produce really good work. After each draft of his essay, Seth and I would talk. He listened and learned. The successive draft would not parrot my thoughts at all, but would reflect what Seth had taken from our conversation, and the result would be a significant improvement. In the end, the result was a really fine essay. But more importantly, for purposes of my being able to recommend him to you, the process reflects the combination of his intelligence and his hunger to excel.

I have enjoyed the benefits of Seth's research on projects of my own, and can speak directly to his energy and ability. I am confident that Seth will be a terrific law clerk. I am very happy to be able to recommend him to you.

Please feel free to contact me if I can be of any further assistance.

With sincere regards,

Lawrence G. Sager
Alice Jane Drysdale Sheffield Regents Chair
The University of Texas at Austin

Lawrence Sager - lsager@law.utexas.edu - 512-232-1322

March 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Mr. Cook is applying for a clerkship in your chambers, and I recommend him with tremendous enthusiasm. Mr. Cook was a student in two of my upper-level constitutional law courses, "Race, Sex, and the Constitution" (Fall of 2021), and "Capital Punishment" (Fall of 2022). The race and sex course focuses on constitutional (and, to a lesser extent, statutory) approaches to race and sex discrimination. The class covers a wide range of materials, including historical, doctrinal, and theoretical frameworks. Although the class was somewhat large (about 40 students), I was able to get to know Mr. Cook well because he was such a strong participant in class discussions, and he regularly attended office hours. He displayed a deep understanding of the complicated theoretical and practical issues surrounding discrimination law, and his comments reflected both his intellectual curiosity and his sophisticated engagement of the course material. Given his consistently positive contributions, I was unsurprised by Mr. Cook's outstanding final exam. His exam was one of the very best in the class, reflecting a clear command of the course material. The following year, Mr. Cook took my capital punishment course focusing primarily on the extensive federal constitutional regulation of the American death penalty. Again, Mr. Cook stood out as a truly outstanding student, one of the best participants in a large (60 person) class. He had a knack for locating the difficult issues in the material and he consistently offered perceptive critiques of prevailing doctrine. Mr. Cook also demonstrated an impressive command of the difficult statutory material in the course – the elaborate doctrines governing the availability of federal habeas corpus review of state criminal convictions. His exam was truly outstanding, reflecting his genuine mastery of the highly technical material as well as a deep understanding of the broader issues at stake in capital litigation.

Apart from our interactions around these classes, I was able to get to know Mr. Cook very well. He participated in our capital punishment clinic, which involves student in the representation of death-sentenced inmates on Texas's death row. My colleagues uniformly viewed Mr. Cook as a particularly able and committed student in the clinic's work. Mr. Cook also serves as a research assistant for my colleague Larry Sager (former Dean of the Law School), and I've found that he, too, regards Mr. Cook as an exceptional student and research assistant (Mr. Cook is currently enrolled in Professor Sager's course on the U.S. Supreme Court, and I believe Mr. Cook helped select the cases from this Court's Term which provide the focus for this semester's seminar).

Mr. Cook stands out as one of our best clerkship candidates. Apart from his tremendous academic achievement, he has had an unusual level of experience and interest in high-powered litigation. In addition to our capital punishment clinic, Mr. Cook served as an intern for Judge Davis in the bankruptcy court; after graduation, Mr. Cook will serve as a law clerk for Justice Lehrmann on the Texas Supreme Court.

I've spent some time discussing Mr. Cook's career aspirations and he seems interested in pursuing post-conviction capital defense, perhaps in one of the Capital Habeas Units housed in the various Federal Public Defender offices. He will bring a wealth of knowledge about criminal justice issues and federal habeas to a federal clerkship, and the experience of a federal clerkship will greatly advance his training for a position at one of the federal CHUs.

On the more personal side, Mr. Cook is a delight. He is an unusually mature student who wants to use his legal training to support individuals in great need. He is bright, hardworking, and very talented. He also loves to engage in wide-ranging conversations about legal theory and legal practice. He seems to have a great appreciation of the complexity of legal interpretation while maintaining a healthy grounding in the details of legal practice. He would be a welcome addition to any chambers. I count him as one of the true stars of the current class.

Sincerely,

Jordan M. Steiker
Judge Robert M. Parker Endowed Chair in Law
Co-Director, Capital Punishment Center
The University of Texas School of Law

Jordan Steiker - jsteiker@law.utexas.edu - 512-232-1346

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
HOMER J. THORNBERRY JUDICIAL BUILDING
903 SAN JACINTO BLVD., SUITE 332
SAN ANTONIO, TEXAS 78701

CHAMBERS OF
HON. TONY M. DAVIS
JUDGE

(512) 916-5875
FAX (512) 916-5808

Dear Judge,

Seth interned with us during the latter part of the summer of 2021, which is the typical period of time for a summer intern. Within that short period of time, we typically do not get a lot of worthwhile work product out of our interns, given the amount of time required to orient them to our chamber's procedures, processes, and forms. Seth, though, pick up on all three very quickly, and managed to make a meaningful contribution to our chambers. He did so, I think, because of his innate intelligence, his natural curiosity about the law, and because he really enjoyed our collaborative chambers environment. On that point, we enjoyed Seth as well, as he is quite personable.

Among other things, Seth prepared a well-researched, well-written memo on a very technical area of bankruptcy law, he properly analyzed a plan filed under the new provisions of Subpart V of chapter 11, and he prepared a short ruling on a request for an award of costs. The latter impressed me the most. Most interns, faced with a practical task like that, will agonize endlessly, and then produce something several pages too long. Seth succinctly stated the facts, the relevant legal test, and correctly applied that test to the facts, all in about a page – on his first draft. I made minor, stylistic changes and then signed it.

Seth has the intelligence, the personality, and the enthusiasm needed to become a good law clerk.

Best Regards,

Tony M. Davis

The Honorable Tony M. Davis

March 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter in support of Seth Cook's application for a clerkship in your chambers. As a former federal district court clerk, I recognize the intellectual skill and work ethic required to successfully aid your duties behind the bench and am happy to recommend a candidate that I believe would be a great asset to your office.

I know Seth from his time as a summer associate in the Austin office of my law firm, Pillsbury Winthrop Shaw Pittman LLP. I was assigned to be Seth's mentor at the firm and was thus able to gain a first-hand glimpse into his dedication, legal instincts, and his overall curiosity. On the basis of my work with Seth, and having observed the work he did for others in my office, I am confident he will make an excellent law clerk.

As a summer associate, Seth's work product was impeccable. His research was thorough, his analysis balanced and well-reasoned, and his writing crisp, to the point, and easy to read. One assignment that readily comes to mind and reflects these qualities was based on a request for research and guidance concerning a particularly unclear area of Texas state law pertaining to the precise contours of contracts that call for successive performance and that are arguably indefinite in duration. In light of the lack of clarity in Texas law, and the contract Seth was asked to analyze, numerous questions arose. When a contract that calls for successive performance by one party, but does not set forth a particular time for the performance to end, is the contract indefinite as a matter of law? Conversely, where the contract does not have a specified end date, but there is an ascertainable event which both parties can identify that determines the contract's duration, even if that event might never occur, does that render the contract definite? What if the contract merely states that a non-breaching party can terminate the contract if the other party is in breach and fails to cure? Does that render an otherwise indefinite contract definite? Or are such events not of the kind that transform a contract of indefinite duration into one of definite duration because they simply state a fundamental principle of contract law, i.e., that a party may terminate an agreement if the counter-party materially breaches and fails to cure? And what if the contract is found to be indefinite? Does it become terminable at will or is the court to impute a reasonable time for performance?

These questions were difficult ones, with no simple answers and little by way of consistent guiding precedent. The Texas Supreme Court had only spoken to the issue on a scant few occasions, and never in the context of purely private contracting parties – all pertinent cases from the state supreme court involved contracts for government service, which often involved extra-contractual considerations, such as those called for by statute or public policy concerns typically absent from the private party context. Seth responded quickly with a well-researched, lengthy analysis that answered all questions posed, and more importantly, reflected hard work and thoughtful reasoning. It was clear that, instead of reaching a conclusion at the outset and working backwards to support his conclusion, Seth took a great deal of time to digest the pertinent authority, consider the facts and surrounding equitable circumstances, and present various potential applications of the law. After he submitted his work, we asked Seth to turn around and begin drafting a motion for summary judgment based on his findings. That is, as a summer associate, we were glad to leverage Seth's work directly into a filing with the court, and I trust he would perform similarly for your chambers.

From this assignment and various others, I learned that Seth displays a very strong ability to quickly grasp and work with legal doctrine. I was particularly impressed with his ability to delve into the details of a particular issue, quickly digest the facts and law, and clearly and succinctly produce a summary and reasoned application of the controlling and persuasive authority, all while preserving a strong sense of the context from which the matter arose. He clearly has the tools to become an exceptionally skilled law clerk and lawyer. Of course, none of this should come as a surprise, as Seth's academic record is excellent. I suspect his skills will only sharpen with the experience he will receive while clerking for Texas Supreme Court Justice Debra Lehrmann upon his graduation.

On a more personal note, having spent a significant amount of time with Seth, I can confidently say that—above all else—he is an individual that earnestly cares for his friends and colleagues. He was very much the "glue" of his summer class, as he repeatedly helped his fellow summer associates complete tasks in the short time frame allotted when they were overworked. Seth's inclination to care for those around him and volunteer to aid their work efforts is a trait that will surely be of great value in light of the complex cases and increasingly immense workload born by your chambers.

In short, I recommend Seth to you enthusiastically and without reservation. If I can be of any further assistance in your review of his candidacy, please feel free to contact me.

Very truly yours,

Ben Bernell, Partner

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William "Seth" Cook
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Writing Sample

This writing sample is an excerpt from an appellant's brief written for an advanced legal writing class at the University of Texas School of Law. This version of the brief has the benefit of generalized global feedback given to the whole class, but no specific editing or commentary.

I was assigned to represent the appellant, a visually impaired history professor named Howard Bekavac. When Professor Bekavac sought to order from a web-based catering company for his students, his screen reading software was unable to vocalize the website's menu. Appellee, Klingenmaier's BBQ4U, had designed their website with only images as a menu which functionally prohibited the website from being accessible to the visually impaired. The district court ruled that websites did not qualify as public accommodations as a matter of first impression and granted summary judgment for the appellee. The sole issue on appeal is whether a web-based business without a nexus to a physical location qualified as a public accommodation under Title III of the ADA.

Argument

The Americans with Disabilities Act ("ADA") provides a statutory basis for persons with disabilities to vindicate their equal standing in society. Appellee—a catering corporation—contends that because it does not have a brick-and-mortar store, the ADA cannot make it accommodate persons with visual disabilities. True, the ADA does not expressly state that websites are "places of public accommodation" under § 42 U.S.C. 12182(a). However, the breadth of §§ 12182(a) and 12181(b)'s language and the underlying purpose of the ADA demonstrate that "places of public accommodation" do include web-based companies.

I. THE PLAIN LANGUAGE OF TITLE III OF THE ADA LOGICALLY INCLUDES WEB-BASED BUSINESSES AS PLACES OF PUBLIC ACCOMMODATION.

The language of § 12182 does not expressly exclude web-based businesses from the ADA's requirements. The statute states the purpose of Title III broadly:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation."

§ 42 U.S.C. 12182(a) (emphasis added). This provision plainly states the ADA's intent and the key policies it establishes. Section 12181(7), the provision defining the term public accommodations, lists several examples that any reasonable reader would recognize as *not* primarily in-person services. For example, the inclusion of travel services and insurance sales—intangible goods and services historically rendered

over the phone—substantially calls into question the district court's assertion that the statute requires a physical nexus. Had the authors of Title III sought to ensure that only physical establishments would be considered public accommodations, it would have been far more logical to simply say that. Contradictorily, the district court's interpretation reads a physical nexus requirement by negative implication from a non-exhaustive list of examples—only *some* of which are primarily in-person services.

Also counseling against the district court's interpretation is the language of § 12181(7)(B)—the clause most relevant to this suit. Examples include "restaurants, bars, or *other food services establishments*." § 12181(7)(B). Had Congress intended to include only brick-and-mortar restaurants and bars, it would have refrained from adding an additional phrase expanding the traditional meaning of those terms.

A. The text is broad enough to include web-based businesses.

The term "place of public accommodation" as used and defined in §§ 12182(a) & 12181(7) and when interpreted contextually, includes web-based businesses.

When the legal issue is one of statutory construction, the "court must start with the statute's words." *Sanzone v. Mercy Health*, 954 F.3d 1031, 1040 (8th Cir. 2020). However, "the definitions of words in isolation. . .are not necessarily controlling in statutory construction." *Iverson v. United States*, 973 F.3d 843, 847 (8th Cir. 2020). Further, the "interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.* (citing *Dolan v. U.S. Postal*

Serv., 546 U.S. 481 486 (2006)). Accordingly, the definition of the term "public accommodation" must be construed in the very same contextual and purposeful way.

First, we start with the plain language. An "accommodation" is commonly defined as "something supplied for convenience or to satisfy a need: such as lodging, food, and services or traveling space and related services." Merriam-Webster's Dictionary (12th ed. 2019). This definition tracks well with the examples articulated in § 12181(7): lodging ("an inn, hotel, motel or other place of lodging"), food ("restaurant, bar, or other establishment serving food or drink"), services or traveling space ("a terminal, depot, or other station"). § 12181(7)(a)-(g). In fact, because the statute has numerous other enumerated examples, the statutory definition is even *more* expansive than we find in the dictionary.

Within this expansive definition is "a restaurant, bar, *or other establishment serving food or drink."* § 12181(7)(B). The disjunctive "or" implies that while our traditional understandings of restaurants and bars are plainly included, "other establishment[s] serving food or drink"—which may not fall into traditional archetypes of restaurants and bars—are *also* included. It would be illogical to assume Congress only intended "other establishment[s] serving food or drink" to refer to the same traditional understanding of physical restaurants and bars when it included another clause phrased differently and attached by a disjunctive "or."

While logic counsels against this reading, so does Supreme Court precedent on statutory interpretation. Courts are required to "always turn first to one, cardinal canon before all others…courts must presume that a legislature says in a statute

what it means and means in the statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When giving meaning to words and phrases, the Court has said "it is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538–539 (1955); *see also Williams v. Taylor,* 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman,* 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). If "other establishment serving food or drink" simply refers to in-person physical restaurants and bars, it is superfluous.

Under this cardinal principle against superfluidity, this Court is compelled to interpret "other establishment[s] serving food or drink" to include establishments other than just archetypal concepts of restaurants. One example of another establishment could be a fully web-based catering company. Appellee is unquestionably a food service establishment. However, it obviously does not fit into the traditional concept of a restaurant or bar. Appellee would argue that means it should be exempted from the requirements of § 12182(a). This argument by definition, however, relies on an interpretation rendering "other establishment[s] serving food or drink" utterly superfluous. Under the Court's cardinal principles of statutory interpretation, courts "should be reluctant to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbit v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995).

B. Intra-textual analysis also reveals the contemplation of non-tangible goods and services.

Section 12181(7)(F) includes—as an example of a public accommodation—the rendering of a "travel service" and services of an "insurance office." While the Eighth Circuit has not specifically interpreted "public accommodation" in this light, lower courts within the Eighth Circuit have addressed § 12182(a) in contextually similar ways. *See Dalton v. Kwik Trip, Inc.,* 2021 U.S. Dist. LEXIS 191967, at *8 (D. Minn. Oct. 5, 2021) (supporting the proposition that the lack of specific regulations regarding website accessibility does not eliminate the obligation to comply with the ADA). Notably, several circuits have found § 12182(a) to apply to web-based services.

The Seventh Circuit read § 12182(a) with a focus on the service rendered and deemed the language to include web-based insurance services. *Morgan v. Joint Admin. Bd., Retirement Plan of Pillsbury Co. and Am. Federation*, 268 F.3d 456, 459 (7th Cir. 2001); *see also Doe v. Mutual of Omaha Ins. Co.*, 170 F.3d 557, 558-59 (7th Cir. 1999) (A "…travel agency, theater, website, or other facility (whether in physical space or in electronic space)…that is open to the public cannot exclude disabled persons from…using the facility in the same way non-disabled people do.").

Specifically, the Seventh Circuit's analysis first looked at whether an insurance company could refuse to sell an insurance policy to persons who were visually impaired. *Doe*, 170 F.3d at 557. While the ADA could not compel changes to the underlying policy on visual disability, it barred the company from refusing to sell the policy simply because the customer was blind. *Id.* Later reaffirming this reasoning, the Seventh Circuit noted that since the selling of insurance services was

explicitly enumerated, it did not matter whether the services were sold in person or solely online. *Morgan*, 268 F.3d at 459 ("The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the goods be offered to the public.").

Similarly, the First Circuit held that "Congress clearly contemplated that service establishments include providers of services which do not require a person to physically enter an actual physical structure." *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994). The court reasoned that it would be "irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same service over the telephone or by mail are not." *Id.* The First Circuit recognized that exempting an entire broad category of businesses making sales by phone or mail would produce absurd results and frustrate Congress's intent that "individuals with disabilities enjoy the goods, services…available indiscriminately to other members of the public." *Id.* As applicable as that was to mail and phone sales in 1994, the recognition of disability rights in non-physical spaces is much more vital in a society that conducts 49% of all sales in an online format.

While the Second Circuit has not explicitly held that § 12182(a) applies to websites, it has recognized that "insurance services" is defined by what it provides, not by where it is located. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d Cir. 1999). The court rejected the defendant's argument that "Congress intended the statute to ensure that the disabled have physical access to the facilities of insurance

providers, not to prohibit discrimination against the disabled in insurance underwriting." *Id.* The court stated that this contradicted the plain purpose of the ADA. *Id.* The Second Circuit's reasoning highlighted the varied examples found in § 12181(7)'s lists of public accommodations, and the emphasis placed on access to the services they render and not where or how those services are rendered. *Pallozzi*, 198 F.3d at 32.

Additionally, the distinction that the ADA makes between "places of public accommodation" and the term "facilities" when expressly referring to physical places is significant. *See* 42 U.S.C. § 12183. When the drafters of the ADA wanted to ensure their guidance was applying to exclusively physical places, they used a different word. *See Martinez v. Gutsy LLC*, No. 22-CV-409, U.S. Dist. LEXIS 214830, at *14 (E.D.N.Y. Nov. 29, 2022) ("This change in word choice—from "public accommodations" to "facilities"—when intending to discuss a physical space, further bolsters a textual interpretation of § 12181, in describing the covered entities under Title III, as having been concerned with entities' functions rather than their physical spaces.").

This services-focused view of the statutory language is directly applicable here. It is irrelevant whether the food or drink is ordered from the store, in-person, or online; what matters is that the food service is offered to the public in general and yet remains inaccessible to persons with a visual disability. The key aspect of the enumerated examples is similarity in service, not physical location. *See* Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 21 WIS. L. REV. 719, 766 (2021) ("The statutory focus

is on the entity's function: serving food, creating space for the public to gather, offering entertainment, providing education, offering banking or transportation services."). Because the statute explicitly enumerates food services, this Court should similarly hold that "the site of sale is irrelevant" and that "what matters is that the goods [were] offered to the public." *Morgan*, 268 F.3d at 459.

Intra-textual analysis reveals that the critical value of § 12182(a) is protecting equal access to the "full and equal enjoyment of" goods and services of public accommodations and not merely physical access to in-person establishments. Thus, this Court should recognize what the Seventh, First, and Second Circuits have made clear: the language of § 12182(a) includes exclusively web-based goods and services.

II. LEGISLATIVE HISTORY AND DOJ GUIDANCE REVEAL THAT WEB-BASED BUSINESS ARE PUBLIC ACCOMMODATIONS UNDER TITLE III.

The plain language reading of 42 U.S.C. § 12182(a) does not logically exclude web-based businesses from its definition of public accommodation, and the thoroughly articulated purpose of the ADA supports this reading. Numerous courts have fully fleshed out the legislative history and intra-textual policy goals, finding the refusal to include web-based businesses as public accommodation to lead to absurd results. This Court should recognize this history and purpose and interpret the language in a way that does not doom Title III to technological obsolescence.

A. The legislative history of the ADA compels a "liberal construction" of the enumerated public accommodations.

Congress enacted the ADA to "remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). Specifically,

Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* at 674-75 (citing 42 U.S.C. § 12101(a)(2)).

This pervasive and multi-faceted discrimination found its way into all areas of society in the form of "outright intentional exclusion" and the "failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(a)(5). These practices revealed a "compelling need for clear and comprehensive national mandate to eliminate discrimination against disabled individuals and to integrate them 'into the economic and social mainstream of American life.'" *PGA Tour*, 532 U.S. at 675 (citing S. Rep. No. 101–116, p. 20 (1989)).

Notably, web-based businesses like the appellee in this case did not exist in 1990 when § 12182 was enacted. However, "one of the Act's 'most impressive strengths' has been identified as its 'comprehensive character'" and broad mandate to "remedy widespread discrimination against disabled individuals." *Id.* (citing *Hearings on S. 933 Before the S. Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh)).

In line with this "broad mandate," public accommodation is defined in "terms of 12 extensive categories, which the legislative history indicates should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the non-disabled." *Id.* at 676-77 (citing S. Rep. No. 101–

116, P. 59 (1989); H.R. Rep. No. 101–485, pt. 2, P. 100 (1990), U.S. Code Cong. & Admin. News 1990, pt. 2, at pp. 303, 382–83.). Giving § 12182(a) this liberal construction, "place of public accommodation" followed by the extensive list of examples, should not be construed to exclude web-based businesses.

Further confirming this interpretive intent, explicit in the legislative history is the objective that the statute be applied in stride with technological development. Specifically, the "Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, *should keep pace with the rapidly changing technology of the times*." H.R. Rep. No. 101-485, at 108 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 391 (emphasis added).

B. The DOJ's Guidance on ADA Interpretation explicitly includes web-based goods and services.

Consistent with Congress's intent for the ADA to keep pace with technology, the DOJ has offered guidance on the web-based provision of goods and services. The DOJ has "consistently taken the position that the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web." U.S. Dep't of Just., Guidance on Web Accessibility and the ADA (Mar. 18, 2022).

While the DOJ guidance is not binding on this court, the DOJ's expertise in interpreting federal statutes and recognition of public accommodations as "any business open to the public" are of significant import. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("A guidance document . . . is entitled to deference depending upon the thoroughness evident in its consideration, the validity of its

reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.").

Appellee's proposed construction of Title III would limit this unquestionably expansive undertaking to a subset of public accommodations whose market power is shrinking by the day. This construction contradicts the explicit instructions found in the legislative history announcing the ADA and the rights it sought to protect.

III. THE DISTRICT COURT'S INTERPRETATION WOULD PLAINLY THWART THE PURPOSE OF THE ADA.

The legislative history reveals the unambiguous purpose of Title III—the law protects persons with disabilities from marginalization, segregation, and animus. With this purpose in mind, the limitation of "public accommodation" to only in-person establishments would render the entire statute technologically obsolete and give modern businesses free rein to discriminate at will. This interpretation renders the statute contrary to its purpose and makes the ADA itself discriminatory. The facts presented here are sufficient to show the far-reaching harm of this interpretation.

First, this narrower interpretation allows modern web-based businesses to avoid ADA compliance by simply shifting their customer interaction entirely online. Prof. Bekavac does not assert that the Appellee designed its website out of animosity toward the blind community. However, if the Appellee allowed food to be picked up from the property where the smoker was located, there would be *no question* about whether it was a public accommodation. Let us consider if this had been the case. Had the Appellee maintained the same website but allowed customers to pick up their

orders from the smoker property or the kitchen where she made the sides, there would be an unquestionable nexus to physical property. Had Prof. Bekavac brought this same claim, there would have been immediate relief.

Under the district court's interpretation of Title III, however, the Appellee could skirt its duty to respect the professor's civil rights simply by not allowing customers to pick up their food anymore. This arbitrary and logistical choice would allow the Appellee to discriminate against the blind for the rest of its existence, insulated from any challenge. This example reveals how arbitrary it would be in this modern day—where almost every business providing goods or services has a website performing significant portions of its sales[1]—to exempt web-based businesses from their obligation to respect the civil rights of persons with disabilities.

Second, this interpretation of "public accommodations" makes Title III itself discriminatory on its face. By vindicating the rights of the disabled in physical establishments only, Title III tells persons with disabilities preventing them from engaging in in-person commerce that their disability is too severe for their rights to be protected. If Prof. Bekavac could not get around independently and instead chose to purchase his groceries from a web-based meal service, he would be functionally deemed without rights to vindicate. Additionally, in the era of Covid-19, those who may be severely immunocompromised and are encouraged to avoid in-person gatherings and crowded stores would be cast aside. This Court cannot recognize an

[1] *See*, *supra*, note 1, https://www.drip.com/blog/online-shopping-statistics.

application of the ADA that creates a ranking among people with disabilities deeming some of them *too disabled* to protect.

The district court's interpretation of "public accommodations" to solely include physical locations fails to recognize the purpose of Title III. Any party that wanted to avoid ADA compliance could move its customer interaction online—an increasingly common choice as we recover from a global pandemic. This scenario would render illusory the civil rights of the disabled that the ADA claims to vindicate and allow businesses to sidestep even the most reasonable regulations—either out of animus or laziness.

Conclusion

Title III of the ADA promises those with disabilities the full and equal enjoyment of the goods, services, and privileges of public accommodations. As we continue developing a technologically advanced and online society, it cannot be the case that a company conducting its business solely online renders Title III an illusory promise of civil rights for Prof. Bekavac.

For these reasons, this Court should agree with the First, Second, and Seventh Circuits that "public accommodations" includes web-based businesses, reverse the lower court's grant of summary judgment, and remand for further proceedings.

Applicant Details

First Name	**Ciara**
Middle Initial	**N**
Last Name	**Cooney**
Citizenship Status	**U. S. Citizen**
Email Address	**cnc63@georgetown.edu**
Address	**Address** Street **811 4th St NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7039753415**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William E. Leahy Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Sirota, Rima
rs367@law.georgetown.edu
(202) 353-7531
Wolfman, Brian
wolfmanb@georgetown.edu
O'Sullivan, Julie
osullij1@law.georgetown.edu
McCord, Mary
mbm7@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CIARA COONEY
cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington, D.C. 20001

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker:

I am a recent Georgetown University Law Center graduate and I am applying for a clerkship in your chambers for the term beginning in 2024.

My strong desire is to serve indigent and incarcerated individuals navigating the legal system. At Georgetown, I sought experiences that cultivated this passion. I served as a legal extern for Rights Behind Bars and as a student attorney in the Appellate Courts Immersion Clinic. In the clinic, I had the unique opportunity to argue one of our cases before the D.C. Circuit. I take great joy in the process of deconstructing arguments, thinking strategically about how to frame cases, and distilling complex issues in a clear manner.

Above all, I am driven by curiosity and eager to continue learning. I would be honored to serve as your law clerk. My resume, law school transcript, and writing sample are enclosed. You will also be receiving letters of recommendation from Professors Brian Wolfman (202-661-6582), Mary McCord (202-661-6607), Julie O'Sullivan (202-662-9394), and Rima Sirota (202-662-6728) on my behalf. Thank you for your consideration.

Respectfully,

Ciara Cooney

CIARA COONEY

cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington D.C. 20001

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER, J.D., *magna cum laude* May 2023

GPA: 3.90

Activities: William E. Leahy Moot Court Competition (Best Advocate)
American Criminal Law Review (Volume 60 Managing Editor)
Supreme Court Institute (Research Assistant)
Professor Rima Sirota (Research Assistant for Legal Practice)

Honors: Order of the Coif
Associate Dean's Award for Excellence in Clinic, Professor Brian Wolfman
CALI Award for Excellence in Criminal Justice, Professor Julie O'Sullivan

Publications: *Anything but Compassion: The Conflict Between Exhaustion and Compassionate Release*, 61 Am. Crim. L. Rev. __ (forthcoming 2023)
Discourse YouTube Series, Episode 01: Originalism (Moderator) (link)

UNIVERSITY OF VIRGINIA, B.A. with High Distinction in Public Policy & Leadership May 2017

Capstone: *Issues Impacting the Aging, Low-Income Population in Albemarle County*

EXPERIENCE

U.S. COURT OF APPEALS, TENTH CIRCUIT Aug. 2025–2026 (forthcoming)
Law Clerk to the Hon. Scott M. Matheson, Jr.

APPELLATE COURTS IMMERSION CLINIC, Washington, D.C. Jan.–May 2023
Student Attorney

- Argued before D.C. Circuit panel on whether a statutory filing deadline was a nonjurisdictional, claim-processing rule and whether equitable tolling was appropriate (link to argument audio).
- Co-authored briefs addressing the Civil Service Reform Act's jurisdictional requirements and equitable tolling; *Younger* abstention; and compassionate release.

RIGHTS BEHIND BARS, Washington, D.C. Sept.–Nov. 2022
Legal Extern

- Drafted opening brief section on Eighth Amendment deliberate indifference to medical needs; provided research on ADA liability and religious freedom protections in prisons.

KAPLAN HECKER & FINK LLP, New York, NY May–July 2022
Summer Associate; Law Clerk (forthcoming Sept. 2023)

- Drafted reply brief section on Prison Litigation Reform Act's three-strikes rule.
- Researched and wrote memoranda on legal issues including liability for defamation, Title IX developments, judicial review of arbitration, and federal and state criminal procedure.

GEORGETOWN ICAP, Washington, D.C. Aug.–Dec. 2021
Constitutional Impact Litigation Practicum Student

- Authored memorandum on a circuit split under Federal Rule of Civil Procedure 15(c); provided research for amicus brief on DACA's public safety benefits.

OFFICE OF THE PUBLIC DEFENDER, Arlington, VA May–July 2021
Legal Intern

- Drafted motion to suppress evidence collected from a vehicle on Fourth Amendment grounds.

PERSONAL

- Fledgling sketch-artist. Avid reader. Flat-white enthusiast. British, Irish, and American citizen.

Record of: Ciara Noelle Cooney
GUID: 802370126

GEORGETOWN UNIVERSITY
OFFICE OF THE LAW CENTER REGISTRAR
WASHINGTON, D.C. 20001
(202)662-9220

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 07, 2023
Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	11	Civil Procedure Charles Abernathy	4.00	A-	14.68	
LAWJ	004	11	Constitutional Law I: The Federal System Josh Chafetz	3.00	A-	11.01	
LAWJ	005	12	Legal Practice: Writing and Analysis Diana Donahoe	2.00	IP	0.00	
LAWJ	008	11	Torts Girardeau Spann	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	41.69	3.79
Cumulative	11.00	11.00	41.69	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	002	11	Contracts Anupam Chander	4.00	A-	14.68	
LAWJ	003	11	Criminal Justice Julie O'Sullivan	4.00	A+	17.32	
LAWJ	005	12	Legal Practice: Writing and Analysis Rima Sirota	4.00	A+	17.32	
LAWJ	007	91	Property Madhavi Sunder	4.00	A-	14.68	
LAWJ	1701	50	International Economic Law and Institutions Sean Hagan	3.00	A	12.00	
LAWJ	611	04	Restorative Justice: Law and Policy Intersections Thalia Gonzalez	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	76.00	4.00
Annual	31.00	30.00	117.69	3.92
Cumulative	31.00	30.00	117.69	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	07	Administrative Law Glen Nager	3.00	A	12.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Mary McCord	5.00	A	20.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	A	16.00	
LAWJ	317	05	Negotiations Seminar Kondi Kleinman	3.00	A	12.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.00	4.00
Cumulative	46.00	45.00	177.69	3.95

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	165	07	Evidence Mushtaq Gunja	4.00	A-	14.68	
LAWJ	1655	05	Criminal Justice Reform Seminar Shon Hopwood	3.00	A	12.00	
LAWJ	361	09	Lawyers' Ethics Abbe Smith	2.00	B+	6.66	
LAWJ	455	01	Federal White Collar Crime Julie O'Sullivan	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.34	3.80
Annual	28.00	28.00	109.34	3.91
Cumulative	59.00	58.00	227.03	3.91

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1447	08	Mediation Advocacy Seminar Kelly Walsh	2.00	A-	7.34	
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program) Sandeep Prasanna		NG		
LAWJ	1491	119	~Seminar Sandeep Prasanna	1.00	A-	3.67	
LAWJ	1491	121	~Fieldwork 3cr Sandeep Prasanna	3.00	P	0.00	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A	8.00	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	A-	11.01	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	11.00	8.00	30.02	3.75
Cumulative	70.00	66.00	257.05	3.89

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments	1.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic		NG		
LAWJ	504	30	~Writing	4.00	A-	14.68	
LAWJ	504	80	~Research and Analysis	4.00	A	16.00	
LAWJ	504	81	~Advocacy & Client Relations	4.00	A	16.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	14.00	54.68	3.91
Annual	26.00	22.00	84.70	3.85
Cumulative	85.00	80.00	311.73	3.90

End of Juris Doctor Record

This electronic seal and signature serve as official certification on the following document.

Cornelia Gustafson
Interim Assistant Dean & Registrar

08-JUN-2023

GEORGETOWN UNIVERSITY LAW CENTER
EXPLANATION OF GRADING SYSTEM

Student matriculating in Fall 1998 or later

GRADE	Quality Points
† A+	4.33
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D	1.00
F	0.00

Averages are rounded to two decimal places.

Students who matriculated prior to Fall 1998

GRADE	Quality Points
A	12.000
A-	11.000
B+	10.000
B	9.000
B-	8.000
C+	7.000
C	6.000
C-	5.000
D	3.000
F	0.000

Averages are carried to three decimal places.

Center for Transnational Legal Studies-London Prior to Fall 2011 ‡

GRADE	Explanation
05	Outstanding
04	Excellent
03	Good
02	Fair
01	Fail

‡ Fall 2011 through Summer 2012, the Center for Transnational Legal Studies awarded the grades from 5.0 (highest score) to 1.0 (failing score), in 0.5 increments.

† In Fall 2009, the faculty established a grade of A+ for truly extraordinary academic performance in a law school class. From Fall 2009 to Spring 2020, the A+ grade carried quality points of 4.00. Beginning Summer 2020, the A+ grade carries quality points of 4.33.

An average may be computed by multiplying the numerical equivalent of each letter grade by the credit value of the course, then dividing the total thus obtained by the total number of quality hours (QHRS).

A semester is 13 weeks of class meetings. Class periods are 55 minutes per credit.

Grades for courses taken at other institutions appear on the student's transcripts but are not computed into the Law Center's average.

Current Grading Symbols

AF -Administrative F* (The student failed to take the examination or complete other course requirements.)
AP -Administrative Pass** (The student passed the course but did not stop writing before the time allowed for the examination expired.)
AU -Audit (non-degree only)**
CR -Administrative Credit**
IP -Course in Progress**
NG -Non-Graded Course**
NR -Grade Not Recorded**
P -Pass **
H -Honors**
W -Withdrawal**

Prior Grading Symbols

EW -Excused Withdrawal
PR -Proficient
S -Satisfactory
U -Unsatisfactory
NC -No Credit

Other Symbols

EHRS - Earned Hours
LW - Legal Writing Requirement
QHRS - Quality Hours
QPI - Quality Point Index
QPTS - Quality Points
RC - Residency Requirement
R - Include/Exclude Credit

* Included in quality hours and grade point average.
** Not included in quality hours or grade point average.

Inquiries may be addressed to:
Office of Registrar, Georgetown University Law Center
600 New Jersey Avenue, N.W. Washington, D.C. 20001
Tel: (202) 662-9220 Fax: (202) 662-9235
lawreg@law.georgetown.edu

Send To : CIARA COONEY

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Ciara Cooney for a judicial clerkship. Ms. Cooney was the top student in my Legal Practice class during her first year at Georgetown Law, and she was an exceptional research assistant for me in her second year.

Legal Practice is a year-long legal research and writing course, organized so that students research and write (and re-write, and re-write again) a number of increasingly complex assignments throughout the year. The Fall semester focuses on objective memoranda, while in the Spring we turn to persuasive advocacy. Throughout the year, I also include a number of smaller units designed to introduce students to other practical lawyering skills such as oral argument and writing for a variety of audiences.

Ms. Cooney earned the highest total score out of fifty-one students and an A+ grade. She excelled on every measure. For example, I had students independently research and write a complex appellate brief on a witness identification issue at the end of the spring semester. Ms. Cooney's submission was so accomplished that I posted it for the entire class as a model of what I was looking for. Additionally, Ms. Cooney earned top marks on timeliness, participation, attendance, and effort on ungraded assignments; these professionalism qualities are sometimes overlooked and undervalued by law students, but not by Ms. Cooney.

Given her performance in my Legal Practice class, Ms. Cooney was an easy pick to be my part-time research assistant during the fall semester of her second year. I made an excellent choice. To help me prepare an upcoming writing problem for my first-year students, Ms. Cooney researched and wrote an appellate brief for one side in a Terry stop matter. Ms. Cooney worked independently, coming to me with questions only after she had thought them through. Our conversations and her final work product resulted in a far more focused and manageable writing problem for my students.

In addition to working as my research assistant, she was also selected as a research assistant for Georgetown's Supreme Court Institute. I asked the Director of the Institute about Ms. Cooney's performance in this role, and her experience with Ms. Cooney echoes my own:

> Ciara has demonstrated the highest level of responsibility, reliability, integrity, maturity, discretion, and professional demeanor. She is consistently responsive, knows when to ask questions, is fastidious about details, and meets deadlines without reminders. Ciara has stood out among her peers for her enthusiasm and positivity and has been an exceptional collaborator in ensuring the success of our program. I could not be happier that she accepted my offer to serve as an RA for the Supreme Court Institute for a second year.

Throughout law school, Ms. Cooney continued to seize opportunities to further hone her research and writing skills. She was elected Managing Editor of the American Criminal Law Review, which also published her note on exhaustion and compassionate release. Through the Appellate Courts Immersion Clinic, Ms. Cooney argued to the D.C. Circuit that a thirty-year-old precedent should be overturned, and she helped draft several of the briefs. Shortly before graduation, Ms. Cooney was invited to moderate a discussion on originalism between Georgetown's Dean and the Executive Director of Georgetown's Center for the Constitution.

I asked Ms. Cooney why she is seeking a clerkship. She cited her love of problem-solving and the opportunity to learn how advocates and judges shape the law. She also believes quite simply that she would be good at it and would enjoy it. Based on my experience with Ms. Cooney, that is absolutely right. She is detail-oriented, reliable, an effective researcher, and a clear and concise writer; she is clear-eyed in assessing the strengths and weaknesses of legal arguments; and her positive attitude is second to none.

I recommend Ms. Cooney to you with no hesitation.

Sincerely,

Rima Sirota

Rima Sirota - rs367@law.georgetown.edu - (202) 353-7531

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

June 7, 2023

Re: Clerkship recommendation for **Ciara Cooney**

I enthusiastically recommend Ciara Cooney to serve as your law clerk.

I got to know Ciara in the spring semester of 2023 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Ciara's work in the seminar later in this letter.) I worked with Ciara nearly daily for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Ciara would be an excellent law clerk. Ciara's work in our clinic was very strong. Her legal analysis was generally spot on. She never looked for easy ways out of tough legal problems. Her writing was clear and straightforward. Ciara works hard. She was highly dedicated to her clients and was a terrific colleague to the other students and her clinic mentors.

For these reasons, I awarded Ciara the Associate Dean's Award for Excellence in Clinic—which I give to only two students over the entire academic year. This award is the highest graduation recognition that a Georgetown Law clinic student can achieve. According to the school "this award recognizes students who are nominated by their clinic faculty

600 New Jersey Avenue, NW Washington, DC 20001-2075
PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

supervisors and acknowledges their exceptional work as student attorneys on behalf of the clinic's clients."

I'll turn now to Ciara's major clinic projects. First, Ciara was asked to write a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a statute of limitations applicable in certain employment-discrimination suits is "jurisdictional" and therefore not subject to equitable tolling. Working with two other students, Ciara explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. The team also argued that, under the particular circumstances of the case arising from the pandemic, the deadline should be tolled. Ciara did an excellent job researching and writing the brief. Ciara also had the rare opportunity as a student to argue the appeal to the D.C. Circuit. Ciara prepared painstakingly. We mooted her almost daily for nearly three weeks. She mastered the record. She tracked down and read every authority. After each moot court, she responded to feedback and improved her presentation. She did all this while maintaining full responsibility for her other pending clinic project (the cert petition described below). Ciara did a beautiful job with the argument.

Ciara's other two projects were equally challenging. She was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most practicing lawyers, yet Ciara understood them quickly, and she, along with two colleagues, produced a first-rate petition.

Ciara's final project was her largest. Again working with two other students, Ciara prepared a petition for a writ of certiorari on the question whether a prisoner's petition for compassionate release under the First Step Act may rely on legal errors in the prisoner's underlying criminal proceedings or whether those errors may be considered only on habeas review. The case is pending, and confidentiality concerns preclude me from disclosing much more. Suffice it to say that crafting a brief based on the traditional pedestals of cert-worthiness—a circuit conflict, the importance of the question presented, etc.—is an unusual task for a student. Yet Ciara quickly understood how this project differed from writing a normal appellate brief. She brought surprising sophistication to the assignment, along with the clear writing and analytical prowess I've already described.

* * *

As noted at the beginning of this letter, my clinic students are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal clerkships. Ciara's work in this class was consistently strong. On the most difficult assignment—a motion to dismiss for lack of appellate jurisdiction arising from a complex mass-tort class action—Ciara received a 3.9 on a 4.0 scale, the second highest grade in the course. Overall, Ciara earned an "A" in a class of high-preforming students.

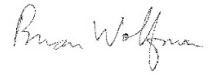
* * *

I want to address a few of Ciara's attributes beyond her pure legal ability.

Ciara generally operates independently. She tries to figure things out on his own—and generally succeeds—but she also knows when to contact mentors to seek guidance. As already indicated, she's a hard worker, and, even when under pressure, she stays on task and completes the job without getting rattled. Ciara is also honest and forthright and is willing to disagree with colleagues and mentors because she wants to get the job done right. Ciara also works very well with colleagues and mentors and has a great sense of humor. In short, she will be an excellent addition to any judicial chambers.

As I said at the beginning, I recommend Ciara Cooney for a clerkship with enthusiasm. If you would like to talk about Ciara, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 2022

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Ciara Cooney to you with all the enthusiasm that decorum permits. Ciara is simply terrific—as a student and as a person.

Ciara (pronounced “Keera”) is very, very bright, and is at the very top of a large and competitive class. If she keeps up the good work and her GPA (3.95 as of this writing), I imagine she will be more than competitive for summa cum laude honors at graduation (last year, the cut-off for magna (top 10%) honors was 3.78). Ciara was enrolled in my Criminal Justice in the spring 2021 semester and earned the best exam out of 59 students, garnering one of the only grades of “A+” I have ever awarded. She again easily earned an “A” in my Federal White Collar Crime class this semester.

We teach basic constitutional criminal procedure in our first year Criminal Justice class, covering the Fourth, Fifth, and Sixth Amendments. Ciara’s exam rivaled my grading sheet and, given that I have been teaching the subject-matter for 26 years and wrote the exam, her performance was spectacular. Ciara knew the voluminous subject-matter cold, showcased outstanding analytical abilities, and demonstrated surprisingly (for her age) mature and balanced judgment in resolving close questions.

The spring semester was conducted entirely by zoom but it was a wonderful class, in great part because of Ciara’s participation. She is not a “gunner”; she was judicious in her contributions but she was clearly engaged in the discussion and volunteered often. At one point in the semester, a controversy arose because one of our adjuncts was recorded making racially offensive statements. I offered the students the opportunity to come to what I termed a “listening session,” during which I wanted to hear from them about the controversy and any other concerns they had about the institution or our classroom environment. Ciara was the only white student to show up, and she, too, was there to listen and learn.

Ciara enrolled this last semester in my Federal White Collar Crime class. This course provides a deep dive into a number of frequently charged federal statutes, including perjury, false statements and claims, fraud of all varieties, conspiracy, public corruption (§ 201, the Hobbs Act, and the Foreign Corrupt Practices Act), RICO, and money laundering. We also cover subjects such as mens rea, corporate criminal liability, the U.S. Sentencing Guidelines, grand jury practice, discovery, Fifth Amendment as applied to testimony (and immunity issues) and tangible objects, plea bargaining, parallel proceedings, and the extraterritorial application of criminal statutes. In short, it is a very demanding class in terms of both subject-matter and the sheer volume of law and required reading. Again, Ciara wrote just a terrific exam. Her “A” reflected a comprehensive knowledge of complex materials, terrific analytical ability, and good judgment in resolving close questions.

Unlike most of my students, Ciara is interested in starting her career on the public defense side. This is born of her experiences at two firms engaging in both federal white-collar defense work and the pro bono defense of a Nigerian national incarcerated in the U.K. and fighting extradition to the United States to face credit card fraud charges. Ciara’s ambition was, until those experiences, to become an AUSA, but observing the different processes and outcomes applied to wealthy, as opposed to low-income, defendants caused her to reassess. She felt that many prosecutors were deaf to facts that conflicted with their theory of guilt, presumed guilt rather than innocence, and were dismissive of the humanity of their targets and indifferent to the human impact of their choices. Although I am a former federal prosecutor, I have encouraged Ciara in her ambition because it is the product of experience and a deep commitment to a fair criminal process. She has the extraordinary gifts and passion to ensure that justice is fairly done in our courtrooms by putting prosecutors to the test.

I know personal chemistry is hard to forecast, but I will say that I have found Ciara to be refreshingly straightforward, unassuming, and earnest. And I have truly enjoyed all my many interactions with her. Ciara has a good sense of humor and is a lively and interesting person—and someone I believe will be a very positive presence in chambers. In this regard, I know that many judges like to know a little more about the backgrounds of applicants they are considering inviting into the chambers family and perhaps I can offer some information of value.

Ciara was born in a village in the British countryside to an American mother and an Irish father. Her family immigrated to the United States when she was 9, and she remains cosmopolitan in attitude. She aspires to travel more widely than her father, who has lived in 5 countries and traveled to more than 65. Despite the pandemic, Ciara’s current record of traveling to 27 countries shows her commitment to this endeavor. It is Ciara’s mother, however, who is her role model. Ciara describes her mom as a force of nature, beloved by all. A corporate immigration lawyer who runs a large office and is the family breadwinner, Ciara’s mother somehow got three kids off to school every day and cooked dinner every night. Ciara says that her mom would show up at all Ciara’s field hockey games, running across the field in kitten heels and hauling a briefcase or two bulging with work. Ciara professes herself “dumbfounded” by her mother’s ability to balance everything and aspires to model her mother’s strength and kindness. I believe that Ciara is well on her way. She has modeled a conscientious commitment to others who need her help by

Julie O'Sullivan - osullij1@law.georgetown.edu

undertaking to tutor first-year students. She works very hard, but never at the sacrifice of friendships or family.

I apologize for going on at such length, but I belief that Ciara is a star. She has the native smarts, developed skills, passion, personality, and values to be an extraordinary clerk. And she is someone who you will be delighted—and proud—to mentor in the years ahead.

Sincerely yours,

Julie R. O'Sullivan
Agnes Williams Sesquicentennial Professor

Georgetown Law
Institute for Constitutional Advocacy and Protection
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

We write to express our enthusiastic support for Ciara Cooney's application to serve as a law clerk in your chambers. Ciara's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the fall of 2021 was consistently exceptional. Her clear and cogent writing style, professionalism, and ability to operate across a broad range of substantive legal areas would hold her in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Ciara not only produced outstanding work in each case on which she worked, but she did so in a professional and efficient manner that will serve her well as a young lawyer. She earned an A in this rigorous course.

At ICAP, we try to give our best students, like Ciara, a broad range of work that allows them to develop their legal skills as they demonstrate their talents. Among other assignments, Ciara researched a circuit split involving the application of the relation-back rule of Fed. R. Civ. P. 15(c)(1)(C) where the identity of a defendant is unknown to the plaintiff at the time the complaint is filed. Because of her exceptional work on this research, we asked her to draft a portion of what later became a petition for certiorari in *Herrera v. Cleveland*. Ciara's research demonstrated her attention to detail and her analysis was clear, thorough and well written. Indeed, it led us to assign her the first draft of an amicus brief for filing in the Fifth Circuit in *Texas v. United States*, a case involving a challenge to the creation of the DACA program. The brief was on behalf of a bipartisan group of current and former prosecutors and, although Ciara was able to work from an earlier amicus brief that ICAP had filed in the Supreme Court in the challenge to the rescission of DACA, this new brief required substantial updating and an entirely new section of argument. Ciara's research was again extremely thorough and her writing exceptional. She also mastered the Fifth Circuit's rules so that our brief was in compliance.

Besides her work on *Herrera* and *Texas v. United States*, Ciara completed half of a 50-state survey of state commitment and release procedures following a not-guilty-by-reason-of-insanity (or equivalent) verdict. This detailed and substantial work product will help ICAP assess whether potential litigation in this area may be warranted.

Worth mentioning, as well, is the careful attention to detail that Ciara displayed in performing even mundane tasks like citechecking and proofreading ICAP briefs before filing. Ciara recognized the importance of scrupulous accuracy and adherence to bluebooking rules. We have no doubt that her skills across the board will make her a valuable asset in chambers.

Finally, in addition to Ciara's significant contributions to ICAP's work, Ciara was also a thoughtful contributor to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Ciara was consistently well prepared and her contributions in these weekly discussions revealed her deep engagement with the material.

Together we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Ciara would be a welcome addition to any judge's chambers. She is mature, collegial, and thoughtful. Her legal writing is well organized and crisply articulated. And her flexibility across substantive legal areas is top-notch. We anticipate an impressive legal career ahead for Ciara.

We would be delighted to answer any further questions that you might have. Thank you for considering Ciara's application.

Respectfully submitted,

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WRITING SAMPLE

The attached writing sample is a final paper submitted for my seminar course, Federal Practice: Contemporary Issues. The paper discusses the development of the major questions doctrine and seeks to identify a judicially-administrable standard post-*West Virginia v. EPA*, 142 S. Ct. 2587 (2022). I am the sole author of this work and it has not been edited by anyone else.

WHAT MAKES A QUESTION MAJOR?—IDENTIFYING A JUDICIALLY ADMINISTRABLE MAJOR QUESTIONS STANDARD AFTER *WEST VIRGINIA V. EPA*

INTRODUCTION

The major questions doctrine, which has been looming in the wings of administrative law for several decades, took center stage in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There, the Supreme Court determined that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act to establish a "best system of emission reduction" that would result in a "sector-wide shift in electricity production from coal to natural gas and renewable."[1] In doing so, the highly-anticipated decision confirmed the major questions doctrine is an independent canon of construction for courts reviewing administrative agency actions. While the decision justified the need for a major questions doctrine and detailed how a major questions analysis should proceed, it did not explain when a major questions analysis is necessary. Phrased differently, what makes a question major? This Paper seeks to provide a judicially-administrable analytical framework for identifying major questions. The Court's articulation of the major questions test in *West Virginia v. EPA* is the starting point and a close analysis of the major questions doctrine's foundations provides further clarification.[2]

Part I discusses the major questions doctrine's foundations and interrelated judicial review principles, specifically, the nondelegation doctrine and *Chevron* deference. Part II briefly summarizes *West Virginia v. EPA* and explains the nuances between the majority's major

[1] 597 U.S. ___, 142 S. Ct. 2587, 2603 (2022).

[2] As a threshold matter, this Paper accepts the existence of the major questions doctrine, as developed by the Supreme Court's jurisprudence and formally recognized in *West Virginia v. EPA*. This Paper does not address legitimate arguments that *West Virginia v. EPA*, and the major questions doctrine generally, is an erroneous departure from traditional statutory interpretation principles. Justice Kagan effectively made that argument in dissent and it has been further articulated by academics. *See West Virginia v. EPA*, 142 S. Ct. at 2633-34 (Kagan, J., dissenting); *see also, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64. Rather, this Paper accepts the validity of the major questions doctrine and seeks to derive a legitimate and administrable standard for identifying major questions cases.

questions standard and Justice Gorsuch's alternative approach, presented in concurrence. Part III first identifies several incorrect approaches to identifying major questions cases arising in the courts of appeals post-*West Virginia v. EPA*. These approaches conflict with the major questions doctrine or lack judicial administrability. Part IV then proposes the following judicially-administrable, element-based test to determine when a major questions analysis is needed. A major questions case requires two distinct elements: (1) a novel and extensive agency action based on the history and breadth of the agency's authority; *and* (2) the agency action implicates issues of great political and economic significance.[3] The factors considered in *West Virginia v. EPA* and their "common threads"[4] in prior cases reveal how the elements are satisfied. Requiring a sufficient showing of both elements ensures only "extraordinary cases" where "common sense" suggests Congress may not have delegated the authority at issue prompt a major questions analysis.[5] This approach, implicit in *West Virginia v. EPA*, has subsequently been endorsed by the U.S. Court of Appeals for the D.C. Circuit.[6]

I. THE FOUNDATIONS OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine falls within the broader framework for judicial review of agency action. There are two foundational principles of judicial review critical to understanding the major questions doctrine: delegation of authority to administrative agencies and *Chevron* deference. This Part will (A) provide a brief synopsis of delegation principles and the relationship to judicial review; (B) explain the deferential standard of review established by *Chevron*; and (C) trace the subsequent development of the major questions doctrine.

[3] 142 S. Ct. at 2608.
[4] *Id.* at 2609.
[5] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[6] *See* Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 363–64 (D.C. Cir. 2022).

A. Congressional Delegation and Judicial Review of Agency Action

Separation of powers principles are derived from the vesting clauses of the U.S. Constitution, which assign all executive, legislative, and judicial powers to the corresponding branches.[7] The vesting of legislative power in Congress has been determined to include "a bar on its further delegation."[8] This prohibition on Congressional delegation of "powers which are strictly and exclusively legislative" is referred to as the nondelegation doctrine.[9]

To abide by the nondelegation doctrine, Congress must include an "intelligible principle" in the authorizing statute to guide the executive agency.[10] The intelligible principle standard is viewed broadly and Congressional delegations of authority to the executive branch have almost uniformly been upheld.[11] Congress has violated the nondelegation doctrine on only two occasions in 1935.[12] Since then, the Court has consistently upheld Congressional delegations of authority to executive agencies, prompting scholars to argue the nondelegation doctrine is a separation of powers red herring.[13] But some justices appear interested in reinvigorating the nondelegation doctrine. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), a plurality upheld Congress's delegation of authority to the Attorney General to determine how the Sex Offender Registration and Notification Act (SORNA) applied to sex offenders convicted prior to passage of SORNA.[14] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented and called for the

[7] Article I of the Constitution provides "[a]ll legislative Powers … shall be vested in a Congress of the United States." U.S. Const. art I, §1. Article II then vests the executive power in the President, U.S. Const. art II, §1, and Article III vests the judicial power in the Supreme Court, and inferior courts created by Congress, U.S. Const. art. III, §1. *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PENN. L. REV. 379, 389 (2017).
[8] *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality).
[9] *See id.*; 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:13 (3d ed. 2022).
[10] *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
[11] *See* Whittington & Juliano, *supra* note 7, at 392-406.
[12] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[13] *See generally* Whittington & Juliano, *supra* note 7; Eric A. Posner & Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).
[14] *Gundy*, 139 S. Ct. at 2121–24.

Court to "revisit" the nondelegation doctrine.[15] According to Justice Gorsuch, the Court has not been fulfilling its "obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."[16] He proposed a more stringent standard for the "intelligible principle" test.[17] Concurring in the judgment in *Gundy*, Justice Alito also expressed his "support" for a reconsideration of the Court's approach, which has "uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[18]

Whether or not the Court bolsters the nondelegation doctrine, it frames the major questions doctrine because it defines the outer limits of authority that may be delegated to an agency. Congress cannot delegate "powers which are strictly and exclusively legislative,"[19] but Congress also "cannot do its job absent an ability to delegate power under broad general directives."[20] Within these hazy and indeterminate constraints, the Court has recognized an area of permissible delegation. As discussed further *infra*, the major questions doctrine is then a tool to determine whether Congress in fact delegated the authority asserted by the agency.

B. Chevron *Deference: Implicit Delegation*

Congress delegates powers to administrative agencies by authorizing the agency to administer statutes.[21] The agencies then "make all sorts of interpretive choices" about the statutes they administer.[22] Yet, it is emphatically the "province and duty" of the courts to determine "what the law is."[23] Therefore, prior to 1984, it was "universally assumed" that courts had the ultimate

[15] *Id.* at 2131 (Gorsuch, J., concurring).
[16] *Id.* at 2135.
[17] *Id.* at 2141.
[18] *Id.* at 2130–31 (Alito, J., concurring in the judgment).
[19] Wayman v. Southard, 23 U.S. 1, 42 (1825).
[20] Mistretta v. United States, 488 U.S. 361, 372 (1989).
[21] United States v. Mead Corp., 533 U.S. 218, 227 (2001).
[22] *Id.*
[23] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"pronounc[ement] on the meaning of statutes."[24] Administrative agencies interpretations could receive some deference, but only to the extent they were persuasive.[25] Then, in an unsuspecting landmark case, the Court announced "a new approach to judicial review of agency interpretations of law."[26] *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984), held that courts must to defer to administrative agencies reasonable interpretations of ambiguous statutes that they administers.[27] Judicial deference was justified by an "implicit rather than explicit" delegation to of authority to the agency.[28] *Chevron* "vastly expanded the sphere of delegated agency lawmaking" by determining that Congress "impliedly delegated primary authority to [agencies] to interpret [ambiguous] statute[s]."[29]

The reaction to *Chevron* deference has been vehement and lasting.[30] Current critics argue it is an afront to the Constitution and undermines separation of powers. For instance, Justice Thomas views *Chevron* deference as in tension with Article III's vesting clause because it "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over the to the Executive."[31] And Justice Kavanaugh, while serving on the D.C. Circuit, criticized *Chevron* deference as an "atextual intervention by courts" that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[32] While *Chevron* still remains good law, the

[24] *See* Thomas W. Merrill, *The Story of* Chevron, 66 Admin. L. Rev. 254, 257 (2016).
[25] *See* Skidmore v. Swift & Co., 323 US. 134 (1944).
[26] Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006).
[27] 467 U.S. 837, 842 (1984).
[28] *Id.*
[29] Merrill, *supra* note 24, at 256.
[30] *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L. J. 1613, 1615–20 (2019).
[31] Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[32] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016).

Court has sought to significantly limit its scope.[33] The major questions doctrine arose as one of these limiting principles.[34]

C. The Development of a Major Questions Doctrine

In *West Virginia v. EPA*, the Court formally "announce[d] the arrival of the 'major questions doctrine.'"[35] But the roots of the major questions doctrine trace back almost three decades.[36] Although the "Court ha[d] never even used the term 'major questions doctrine'" before *West Virginia v. EPA*,[37] the "'label' … took hold because it refer[ed] to an identifiable body of law" with common threads recognized by scholars and jurists.[38] The major question doctrine seemingly sought to address (1) which institution should have comparative authority, the judiciary or the executive agency, to interpret the scope of statutory delegations, as governed by *Chevron* deference; and/or (2) the permissible scope of Congressional delegations to administrative agencies, as restrained by the nondelegation doctrine.

The major questions doctrine was initially presented as a *Chevron* deference limit. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Federal Communications Commission was not entitled to *Chevron* deference because the Commission's interpretation of the term "modify" in Section 203 of the Communications Act went "beyond the meaning that the statute [could] bear."[39] The Court then held that the FCC lacked authority under the Communications Act to adopt the proposed policy because it was "a fundamental revision of the

[33] *See, e.g.*, James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS INST. (Aug. 18, 2022) https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/ (identifying the major questions doctrine as a limit placed on *Chevron* deference).
[34] *See, e.g.*, Sunstein, *supra* note 30, at 1676–76 (explaining the major question doctrine can be understood as "a kind of 'carve out' from *Chevron* deference"); Kunhardt & O'Connell, *supra* note 33.
[35] 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting).
[36] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994).
[37] *West Virginia v. EPA*, 142 S. Ct. at 2633–34 (Kagan, J., dissenting).
[38] *Id.* at 2609 (majority opinion).
[39] 512 U.S. 218, 229 (1994).

statute."[40] Six years later, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court again withheld *Chevron* deference when the Food and Drug Administration (FDA) interpreted the Food, Drug and Cosmetic Act (FDCA) as authorizing FDA regulation of tobacco products.[41] Despite *Chevron*'s premise that "ambiguity constitutes an implicit delegation from Congress," the Court determined "[i]n extraordinary cases … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[42] Because this constituted an extraordinary case, deference was not appropriate.[43] This strand of the major questions doctrine, reflected in a few other subsequent cases,[44] is sometimes called *Chevron* step zero.[45] It operates as "a kind of 'carve out' from *Chevron* deference."[46] Because *Chevron* deference was not appropriate in these extraordinary cases, the Court would revert to traditional judicial review principles and independently resolve the question of law, without deferring to the agency's reasonable interpretations.[47]

But *Brown & Williamson Tobacco Corp.* also introduced an alternative major-questions formulation: the major questions doctrine could preclude agency action on topics of economic and political significance, unless clearly authorized by Congress. Rather than conducting a *Chevron* deference analysis, the Court determined a "common sense" consideration of "the manner in which Congress [wa]s likely to delegate a policy decision of such economic and political magnitude to an administrative agency" should guide statutory interpretations.[48] Relying on this "common

[40] *Id.* at 231–32.
[41] 529 U.S. 120, 125–26 (2000).
[42] *Id.* at 159.
[43] *Id.* at 133.
[44] *See* Gonzales v. Oregon, 546 U.S. 243, 258-59 (2006); King v. Burwell, 576 U.S. 473, 485 (2015).
[45] *See generally* KOCH, JR. & MURPHY, supra note 9, § 11:34.15.
[46] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 482 (2021); *see also Major Questions Objections*, 129 Harv. L. Rev. 2191, 2193 (2016) (note).
[47] *Id.* at 482.
[48] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

sense," courts should recognize "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[49] The Court subsequently adopted a clear statement rule for such cases in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). When an agency seeks to take action with great economic and political significance, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[50] Under this major questions strand, similarly reflected in a few other cases,[51] the issue is not merely the correct interpretation of an ambiguous statute, but whether Congress has delegated authority on the issue of economic and political significance. If Congress failed to provide a clear statement, courts should not independently resolve any statutory ambiguities because additional action from Congress is necessary.[52]

These were not the only major-questions-approaches posited. Some scholars have suggested the major questions doctrine is the nondelegation doctrine disguised as a method of statutory interpretation and the clear-statement rule effectively prohibits Congressional delegations on "major" issues.[53] Other scholars argued the major questions doctrine prevents agency self-aggrandizement.[54] The divergent opinions on the contours and purpose of the major questions doctrine shows the lack of clarity in the early cases. And, as a result, courts, agencies, and litigants lacked clear guidance on how to apply the doctrine.[55]

[49] *Id.* at 160.
[50] 573 U.S. 302, 324 (2014).
[51] *See* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. ___, 142 S. Ct. 661, 665 (2022).
[52] *See* Sunstein, *supra* note 46, at 483; *see also* Sohoni, *supra* note 2, at 264.
[53] *See* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. 174, 177 (2022); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 445 Admin. L. Rev. 445, 463 (2016).
[54] *See* Monast, *supra* note 53, at 462–63.
[55] Richardson, *supra* note 53, at 195–06; *see also* Monast, *supra* note 53, at 464–65; Sunstein, *supra* note 26, at 193.

II. THE MAJOR QUESTIONS DOCTRINE ARTICULATED IN *WEST VIRGINIA V. EPA*

West Virginia v. EPA unequivocally recognized the major questions doctrine as a canon of statutory interpretation[56] and provided an analytical framework for major-questions cases. The decision did not, however, provide a precise standard for identifying when an agency action warrants a major-questions analysis. This Part summarizes the majority opinion in *West Virginia v. EPA* and Justice Gorsuch's concurrence.

The issue presented in *West Virginia v. EPA* was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act."[57] Section 111 of the Clean Air Act ("CAA") directed the EPA to identify categories of stationary sources that significantly cause or contribute to "air pollution, which may reasonably be anticipated to endanger the public health or welfare."[58] Under Section 111(b), the EPA must then promulgate a standard of performance on a pollutant-by-pollutant basis that adequately demonstrates the "best system of emission reduction" (BESR) for *new* sources.[59] Under Section 111(d), the EPA must then address emissions of the same pollutant by *existing* sources, if they are not already regulated under another CAA program.[60]

In 2015, the EPA announced two rules addressing carbon dioxide pollution: one establishing the BSER for new coal and gas plants, and the other establishing the BSER for existing coal and gas plants.[61] The latter was challenged in *West Virginia v. EPA*. The BSER for existing sources,

[56] 597 U.S. ___, 142 S. Ct. 2587 (2022); *see also* David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. LAW BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/; *see also* Kristen E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REG – NOTICE & COMMENT (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/.
[57] 142 S. Ct. at 2615–16.
[58] *Id.* at 2601 (quoting 42 U.S.C. § 7411(b)(1)(A)).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2602.

also called the Clean Power Plan, included three building blocks: (1) practices coal plants could undertake to burn coal more efficiently; (2) generation shifting from coal to natural gas plants; and (3) generation shifting from coal and gas to wind and solar generators. The effect of the Clean Power Plan would be a "sector-wide shift in electricity production from coal to natural gas and renewable."[62] The Clean Power Plan never took effect because dozens of parties sought judicial review the same day the EPA promulgated the rule. And, after a convoluted procedural path, the Supreme Court granted certiorari.

Chief Justice Roberts, writing for the majority, held the EPA lacked authority under the Clean Air Act to adopt the Clean Power Plan as the BSER.[63] In doing so, the Court articulated the major questions standard and its justification:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to clear 'clear congressional authorization' for the power it claims.[64]

The Court first noted the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall scheme."[65] And, where the statute confers authority upon an administrative agency, an inquiry into agency action must be shaped by "whether Congress in fact meant to confer" the asserted authority.[66] A clear statement

[62] *Id.* at 2603.
[63] *Id.* at 2616.
[64] *Id.*
[65] *Id.* at 2607.
[66] *Id.* at 2608.

for agency action on major questions is then justified when the statutory scheme demonstrates an agency interpretation is "extraordinary" and "common sense as to the manner in which Congress [would have been] likely to delegate such power to the agency at issue, ma[kes] it very unlikely that Congress had done so."[67] Major questions cases are a departure from "ordinary" cases involving agency interpretations and assertions of authority.[68]

The Court therefore set out a two-step framework for judicial review of administrative agency action. First, the court must determine whether the asserted agency action presents "a major questions case."[69] If so, "the Government must … point to 'clear congressional authorization' to regulate" in the asserted manner.[70] The terms "major questions case" and "extraordinary cases" are used interchangeably in articulating step one.[71] "Extraordinary cases" are defined as "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance' of that assertion provide a reason to hesitate before concluding that Congress' meant to confer such authority."[72] The Court highlighted several factors that indicate there may be a major questions case: (1) the agency "claimed to discover in a long-extant statute an unheralded power";[73] (2) the claimed power represented a "transformative expansion in [its] regulatory authority";[74] (3) the agency relied on an ancillary, rarely used provision;[75] (4) "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency;[76] (5) the agency lacked "comparative expertise" over the policy judgments;[77] and (6) the

[67] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[68] *See id.* at 2609.
[69] *See id.* at 2610.
[70] *Id.* at 2614.
[71] *Id.* at 2609–10.
[72] *Id.* at 2608 (internal quotation marks omitted) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).
[73] *Id.* at 2610 (quoting Util. Air Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[74] *Id.* (quoting *Util. Air Grp.*, 573 U.S. at 324).
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2612.

proposed policy "has been the subject of earnest and profound debate across the country."[78] Applying these factors, the Court determined it had "a major questions case" and concluded the term "system" was not sufficient "clear congressional authorization" to regulate in the manner prescribed by the EPA Clean Power Plan.[79]

Justice Gorsuch, joined only by Justice Alito, in concurrence took a more expansive view of when a major questions case is presented. Rather than limiting the doctrine to "extraordinary cases" of agency action, Justice Gorsuch would invoke the major question doctrine, and require clear congressional authorization, for all "decisions of vast 'economic and political significance'" by administrative agencies.[80] At first this may not seem to be a significant distinction, but under Justice Gorsuch's approach, a major question case would exist when the agency resolves "a matter of great 'political significance'" *or* imposes significant economic regulations.[81] Unlike the multi-factor approach taken by the majority, Justice Gorsuch seems to suggest political *or* economic significance alone would trigger the major-questions-clear-statement rule, such that "an agency must point to clear congressional authorization."[82] This would likely encompass a broader swath of agency action. Justice Gorsuch recognizes as much by explaining the major question doctrine "took on a special importance" due to the "explosive growth of the administrative state" and seeks to prevent agencies from "churn[ing] out new laws more or less at whim."[83]

Although *West Virginia v. EPA* defined the overarching standard for major questions cases, the list of factors provided by the majority and the divergent approach advocated by Justice Gorsuch left open a significant question: What qualifies as a major-questions case?

[78] *Id.* at 2614.
[79] *Id.* at 2610, 2614.
[80] *Id.* at 2626 (Gorsuch, J., concurring).
[81] *Id.* at 2620 (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022)).
[82] *Id.*
[83] *Id.* at 2618.

III. A JUDICIALLY ADMINISTRABLE TEST FOR IDENTIFYING MAJOR QUESTIONS CASES

Step one of the newly adopted major-questions inquiry requires a court to determine whether agency action presents an "extraordinary case[]."[84] But, as Justice Kagan emphasized in dissent, how court should conduct this inquiry remains unclear: a reviewing court must somehow "decide[] by looking at some panoply of factors."[85] Scholars similarly viewed the Court's guidance on how to decipher when agency action presents a major question insufficient.[86] Despite the "mushy" standard,[87] a judicially administrable test can be identified in *West Virginia v. EPA* and supported by major-questions precedent. This Part will first identify and reject incorrect or unwieldy approaches arising in the courts of appeals. It will then argue that the approach is hiding in plain sight in *West Virginia v. EPA.*

A. Erroneous Approaches to Identifying Major Question Cases

Courts of appeals have attempted to apply the major questions test articulated in *West Virginia v. EPA*, but the approaches lack a judicially-administrable standard or reflect an incorrect understanding of the major questions doctrine.

The Fifth Circuit has adopted two conflicting and incorrect approaches to identifying major question cases post-*West Virginia v. EPA*. First, in *Midship Pipeline Company, L.L.C. v. FERC*, 45 F.4th 867 (5th Cir. 2022), the Fifth Circuit relied on *West Virginia v. EPA* to hold the Natural Gas Act did not authorize FERC to determine reasonable costs of remediation for natural gas pipelines constructed on privately held land.[88] But the court did not conduct step-one of the major questions analysis. Instead, the decision rested on the overarching principle that "[a]gencies have

[84] *Id.* at 2609–10.
[85] *Id.* at 2634 (Kagan, J., dissenting).
[86] *See* Hickman, *supra* note 56 (describing the standard articulated as "mushy .. rather than a bright line rule"); Strict Scrutiny, *Just how bad is the Supreme Court's EPA decision?* (June 30, 2022), https://crooked.com/podcast/just-how-bad-is-the-supreme-courts-epa-decision/ (describing the decision as based on "vibes" about agencies).
[87] Hickman, *supra* note 56.
[88] *Id.* at 876-77.

only those powers given to them by Congress."[89] Based on this premise, the Fifth Circuit conducted a statutory interpretation and determined the Natural Gas Act did not authorize the power asserted by FERC.[90] The court did not consider any of the factors discussed in *West Virginia v. EPA*, including whether FERC's action implicated an issue of economic or political significance This approach conflicts with *West Virginia v. EPA* and the major questions doctrine because it disregards the emphasis placed on "extraordinary cases."[91] By failing to first determine whether the asserted agency action even presented an extraordinary case, the Fifth Circuit erroneously expanded the major questions doctrine from extraordinary cases to all agency actions.

In *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022), the Fifth Circuit took a different approach by erroneously conflating the major questions doctrine and *Chevron*'s step-two.[92] There, the Fifth Circuit held DACA would fail step two of *Chevron* because DHS had unreasonably interpretated the INA.[93] The interpretation was unreasonable because DACA "implicates questions of deep economic and political significance" and there was "no 'clear congressional authorization' for the power that DHS claim[ed]."[94] While in prior cases the Court has blurred the line between the major questions doctrine and *Chevron* deference,[95] *West Virginia v. EPA* disentangled the major questions doctrine and *Chevron* analysis. In almost all prior major questions cases, the Court has used *Chevron* as the starting point for reviewing the administrative agency's statutory interpretations.[96] But *Chevron* was not cited or referenced at all by the majority opinion in *West*

[89] *Id. (*quoting *West Virginia v. EPA*, 142 S. Ct. at 2607).
[90] *Id.*
[91] *See West Virginia v. EPA*, 142 S. Ct. at 2609; *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[92] *See* 50 F.4th at 526–27.
[93] *Id.* at 526
[94] *Id.*
[95] *See supra* Part I.C.; *see, e.g.*, Util. Air Reg. Grp. v. EPA, 573 U.S. 302 314 (2014).
[96] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485 (2015). The Court departed from this approach in just two prior cases. *see* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488–89 (2021) (conducting a statutory interpretation without discussion of *Chevron*); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S.

Virginia v. EPA. And the analytical framework applied was quite distinct. Under *Chevron*, the reviewing court begins with the text to determine whether Congress has directly spoken to the issue.[97] Under the major questions doctrine, the reviewing court begins with the agency action to determine whether it presents an "extraordinary case."[98] And, unlike the deferential treatment of implied delegations in *Chevron*,[99] the major questions doctrine "skepticism" to implied delegations and requires "clear congressional authorization."[100] By collapsing the major-questions analysis and *Chevron* step-two, the Fifth Circuit failed to appropriately analyze whether DACA presented an "extraordinary case" for the purposes of major questions analysis.

In contrast, the Eleventh Circuit applied the correct framework, but struggled to find a judicially-manageable test. In *Georgia v. President of the United States*, 48 F.4th 1283 (11th Cir. 2022), the Eleventh Circuit held the Procurement Act did not authorize agencies to insert a COVID-19 requirement into all procurement contracts and solicitations.[101] The court did not establish a clear test or relevant factors for identifying a major question but seemed to implicitly base its reasoning on three factors identified in *West Virginia v. EPA*. First, the agency claimed to discover an unheralded power to impose an "all-encompassing vaccine requirement" in the Procurement Act's "project specific restrictions."[102] Second, the claimed power represented a transformative expansion in the agency's power because the "general authority … to insert a term in every solicitation and every contract" was "worlds away" from "the sort of project-specific

____, 142 S. Ct. 661, 665–66 (2022) (same). Both of these decisions arose from the Court's emergency docket, also known as the shadow docket. As a result, the per curiam opinions lacked a comprehensive explanation of the Court's analytical approach. *See* Steve Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787, 1788 (2022); Cashmere Cozart, *SCOTUS' Shadow Docket Coming Out of the Shadows*, UNIV. OF ILL. CHI. L. REV. (Sept. 12. 2021), https://lawreview.law.uic.edu/news-stories/scotus-shadow-docket-coming-out-of-the-shadows/.

[97] Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[98] *West Virginia v. EPA*, 142 S. Ct. at 2608.

[99] See *Chevron*, 467 U.S. at 843.

[100] *West Virginia v. EPA*, 142 S. Ct. at 2614.

[101] 48 F.4th at 1296.

[102] *See id.* at 1296.

restrictions contemplated by the [Procurement] Act."[103] And, lastly, Congress had declined to enact legislation conferring this broad authority based on other statutes that impose "a particular economic or social policy among federal contractors through the procurement process," and the absence of a statutory provision imposing an "across-the-board vaccination mandate."[104] While this Eleventh Circuit analyzed the factors identified in *West Virginia v. EPA*, the approach lacks sufficient structure for consistent judicial administration. It is vulnerable to the criticism that courts will simply choose from some unclear "panoply of factors"[105] or make decisions based on "vibes."[106] Thankfully, *West Virginia v. EPA* and prior cases reveal a judicially-manageable test for identifying major questions cases.

B. Identifying Major Questions Cases Using West Virginia v. EPA*'s Dual-Element Test*

i. The dual-element test

In defining "extraordinary cases," *West Virginia v. EPA* impliedly identified a two-element test to determine when a major questions case is presented. The Court defined extraordinary cases based on the "history and the breadth of the authority that [the agency] has asserted, *and* the economic and political significance of that assertion.'"[107] This definition suggests major-questions cases satisfy two distinct elements: (1) the asserted authority is novel and extensive based on the "history and breadth of the authority that the agency has asserted" *and* (2) the asserted authority implicates issues of "economic and political significance."[108] The factors identified by the majority and prior major questions doctrine cases reveal how each element can be satisfied.

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[103] *See id.*
[104] *See id.* at 1297.
[105] *See West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting).
[106] *See* Strict Scrutiny, *supra* note 86.
[107] *West Virginia v. EPA*, 142 S. Ct. at 2608 (emphasis added) (internal quotation marks omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[108] *Id.*

Four factors identified in *West Virginia v. EPA* address whether an agency's action is novel and extensive in light of the history and breadth of the agency's authority: (1) the discovery of an unheralded power in a long-extant statute; (2) the power is a transformative expansion in the agency's regulatory authority; (3) the power is found in an ancillary provision; and (4) the agency lacks comparative expertise over the asserted power. Prior major-questions cases confirm that these factors are evidence of novel or extensive agency action.

An agency's discovery of an unheralded power in a long-extant statute demonstrates novelty because it is a departure from the agency's prior "established practice" and shows a historic "want of assertion of power."[109] In *West Virginia v. EPA*, the EPA "had never devised a cap by looking to a [generation-shifting] system," which indicated the current assertion of authority was a newfound power.[110] Framed differently: the absence of precedent for the asserted authority indicates it is novel.[111] For instance, in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ___, 141 S. Ct. 2485 (2021), the agency's claim of authority was "unprecedented" because no prior regulation under the provision, which was enacted in 1944, approached a similar "size or scope."[112]

A "transformative expansion in [the agency's] regulatory authority"[113] reflects both novelty and an extensive increase in authority. This factor can be shown by a "fundamental revision of the statute" [114] to enable regulation in a new area or industry.[115] The first major questions case, *MCI Telecommunications Corp.*, explains a "fundamental change" "depends to some extent on the

[109] *See id.* at 2610 (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).
[110] *Id.*
[111] *See id.* at 2610; *see also* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021); Nat'l Fed. of Indep. Bus. v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 666 (2022).
[112] 141 S.Ct. at 2489.
[113] *West Virginia v. EPA*, 142 S. Ct. at 2610.
[114] *Id.* at 2611 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).
[115] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000).

importance of the item changed to the whole."[116] When an agency action revises a provision with "enormous importance" to the statutory scheme or "'central' to administration" of the statute, it introduces a "new regime of regulation" that "is not the one that Congress established."[117] By changing the regulatory regime, the agency is asserting regulatory authority over a new area or sector.[118] In *West Virginia v. EPA*, this "fundamental revision" was evidenced by transitioning from regulating the performance of individual sources to regulating the emissions of a sector as a whole.[119]

When the newfound power is located in an "ancillary" or rarely-used provision of the Act,[120] it supports a finding of novelty. The provision relied on by the EPA in *West Virginia v. EPA* was characterized as the "backwater" of the Section because it had been used "only a handful of times" and was "designed to function as a gap filler."[121] In the past, the Court has also found ancillary provisions to contain "express limitation[s]" or address other agency's roles in the regulatory scheme.[122] For instance, in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), a provision authorizing the Attorney General to deny, suspend, or revoke physician's registrations was an express limitation that did not authorize medical judgments because those judgments were delegated to the Secretary of Health and Human Services.[123] Relying on an ancillary provision suggests the action is novel or broad because it introduces a new basis for action and may encroach on another agency.

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[116] *MCI Telecomms. Corp.*, 512 U.S. at 229.
[117] *Id.* at 234.
[118] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 146 (tobacco); Gonzalez v. Oregon, 546 U.S. 243, 261 (2006) (criminalization of medical professionals); Nat'l Federation of Indep. Business v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 665 (2022) (hazards of daily life); Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488 (2021) (downstream connections to the spread of disease).
[119] *Id.*
[120] *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001)).
[121] *Id.* at 2602, 2610, 2613.
[122] *See Gonzalez*, 546 U.S. at 266–67.
[123] *Id.*

When the agency lacks "comparative expertise" over the asserted policy judgments,[124] the proposed action may be novel and extensive. Generally, "Congress intend[s] to invest interpretive power in the administrative actor in the best position" to exercise such judgment.[125] Where the agency lacks expertise or experience, they are impliedly acting outside their area of knowledge and diverging from their historical practices. In *West Virginia v. EPA*, EPA lacked the necessary "technical and policy expertise" "in areas such as electricity transmission, distribution, and storage."[126] The Court has also relied on an absence of expertise in prior major-questions cases when the Attorney General sought to make medical judgments[127] and the IRS sought to craft health care policy.[128]

West Virginia v. EPA and major-questions precedent also explain how the second element, economic and political significance, can be satisfied. Although the conjunction "and" suggests both economic and political significance is necessary, past cases point to the opposite conclusion.[129] Either economic or political significance is sufficient to satisfy the second element. First, an agency action presents issues of economic significance when it regulates a significant portion of a major American industry;[130] requires billions of dollars in private spending or administrative costs;[131] and/or affects the economic decisions of millions of Americans.[132] In *West*

[124] *West Virginia v. EPA*, 142 S. Ct. at 2613.
[125] *See Gonzalez*, 546 U.S. at 266.
[126] *West Virginia v. EPA*, 142 S. Ct. at 2612.
[127] *Gonzalez*, 546 U.S. at 267.
[128] King v. Burwell, 576 U.S. 473, 486 (2015).
[129] *See, e.g.*, *Gonzalez*, 546 U.S. at 267–68 (addressing only political significance); *Util. Air Reg. Grp.*, 573 U.S. at 322–24 (addressing only economic significance).
[130] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) (agency action would effect 40% of a major sector of the telecommunications industry); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (regulation would apply to an industry constating a significant portion of the American economy); *Util. Air Reg. Grp.*, 573 U.S. at 324.
[131] *See Util. Air Reg. Grp.*, 573 U.S. at 324 (regulations would impose $21 billion in administrative costs and $147 billion in permitting costs); *see also King*, 576 U.S. at 485; Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021).
[132] *See King*, 576 U.S. at 485.

Virginia v. EPA, the Clean Power Plan had economic significance because it would assert "unprecedented power of American industry" and would "entail billions of dollars in compliance costs," which would then affect energy prices for Americans.[133] And, in *King v. Burwell*, 576 U.S. 473 (2015), a regulation that would affect the price of health insurance for millions of people had sufficient economic significance.[134]

Second, political significance can be shown by Congressional action or inaction regarding the specific program, prominent debate surrounding the issue, and/or tension with state law or authority. First, *West Virginia v. EPA*, and past decisions, have placed significant emphasis on whether "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency[135] because the presence of debate or contrary legislation in Congress indicates the "importance of the issue."[136] Second, the issue is politically significant when it has been the "subject of earnest and profound debate across the country"[137] because "political and moral debate" surrounding an issue demonstrates its importance to the public.[138] Third, political significance is shown when the agency action intrudes on a particular domain of state law.[139] In *Alabama Association of Realtors*, the Court identified intrusion on a "particular domain of state law" as a significant non-financial issue because it would "alter the balance between federal and state power."[140]

[133] *West Virginia v. EPA*, 142 S. Ct. at 2604, 2612.
[134] 576 U.S. at 485.
[135] *West Virginia v. EPA*, 142 S. Ct. at 2610; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; *Gonzalez*, 546 U.S. at 267–68; *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2486–87.
[136] *See West Virginia v. EPA*, 142 S. Ct. at 2614.
[137] *Id.*; *see also Gonzalez*, 546 U.S. at 267–68.
[138] *Gonzalez*, 546 U.S. at 249, 267.
[139] *Ala. Ass'n. of Realtors,* 141 S. Ct. at 2489.
[140] *Id.*

ii. The legal and logical case for the dual-element test

The test requires a sufficient demonstration that the agency action (1) is novel and extensive based on the history and breadth of authority *and* (2) implicates issues of economic and political significance. Requiring a major-questions case to satisfy both elements aligns with precedent; serves the "common sense" justification of the major questions doctrine; and provides an objective approach which enables consistent judicial administration.

Although the test was not formulated until *West Virginia v. EPA*, every prior major-questions case has satisfied both elements. For the past thirty-years, the Court has only conducted major-questions analysis when the cases involves both a novel or extensive agency action *and* political or economic significance.[141] Although the exact phrasing of the elements and supporting factors varies, the common threads are clear. And, in formulating each factor, *West Virginia v. EPA* heavily relied on and interpreted the prior cases.[142] This also undermines the approach advocated by Justice Gorsuch. In no case is political *or* economic significance *alone* sufficient to render the case "extraordinary."[143]

The dual-element test ensures the major questions doctrine is only applied in "extraordinary cases" where common sense warrants skepticism of whether Congress delegated authority. An indeterminate and unclear standard could encompass ordinary cases of agency action. If the major

[141] *See, e.g., MCI Telecomms. Corp.*, 512 U.S. 218, 231 (1994) (explaining agency action constituted "fundamental revision" and affected 40% of a major sector of the industry); *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146, 159–60 (2000) (explaining agency action constituted an expansion into the tobacco industry, discovered a new power in a statute, regulated an industry constituting a significant portion of American economy, and Congress had declined to enact such a scheme); *Gonzalez*, 546 U.S. 243, 249, 260–61, 266–67 (2006) (explaining agency action constituted a transformation of the limits placed on the Attorney General to allow regulation in a new area, was outside the expertise of the Attorney General, relied on an ancillary provision, had been the subject of earnest and profound debate, and intruded on state law); *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2488 (explaining agency action constituted a transformative expansion in authority, asserted a unprecedented power, had significant economic impact, and intruded on state law).
[142] *See West Virginia v. EPA*, 142 S. Ct. at 2608–2614.
[143] *See id.* at 2618–26 (Gorsuch, J., concurring).

doctrine required "clear congressional authorization" for mundane and traditional exercises of administrative agency power, it could interfere with the separation of powers by restricting Congress' ability to legislative freely, including authorizing administrative agencies to fill in the gaps of legislation. But a novel or broad assertion of authority is coupled with an issue of significant political or economic importance creates skepticism because it prevents executive branch aggrandizement absent clear congressional authorization. By limiting the major questions doctrine to "extraordinary cases," administrative agencies are cabined within their legislative authority, but courts are not overreaching.

Judicial administration is also bolstered by the test because it relies on objective factors and introduces a clear threshold requirement. A major questions case cannot be demonstrated by a mere showing of some indeterminate degree of political or economic significance. Rather, the agency action must reflect a departure from ordinary agency practice under the first element. And the political and economic implications are not theoretical "vibes," but grounded in an objective showing of political debate, conflicts with state law, or extensive private or public costs.

This test has already been applied, admittedly without extensive analysis or reasoning, in the D.C. Circuit. *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), held a rule requiring New England fisheries to fund at-sea monitoring programs promulgated by the National Marine Fisheries Service pursuant to its authority to establish "fishery management plans" under the Magnuson-Stevens Fishery Conservation and Management Act did not constitute a major questions case.[144] Judge Rogers, joined by Chief Judge Srinivasan, determined the major

[144] 45 F.4th 359, 363–64 (D.C. Cir. 2022). After this paper was drafted, the Supreme Court granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to address "whether the court should overrule *Chevron*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See* Loper Bright Enters. v, Raimondo, No. 22-451 (cert. granted May 1, 2023).

questions doctrine "applies *only*" when the "history and breadth of the authority that [the agency] has asserted *and* the economic and political significance of the assertion" demonstrate an "extraordinary case[]."[145] The monitoring program failed to meet this standard because the National Marine Fisheries Service had "expertise and experience within [the] specific industry" and the agency did not claim "broader power to regulate the national economy."[146] Also, while the Eleventh Circuit did not rely on the two-element framework in *Georgia v. President of the United States*, the court's decision did rely on a showing of both novel or extensive action *and* issues of political or economic significance.[147] These early cases forecast judicial administration may be possible based on the dual-element requirement and objective factors derived from *West Virginia v. EPA*.

CONCLUSION

Admittedly, one aspect of this test remains unclear. Due to varying approaches across cases, it is unclear how many factors are necessary to demonstrate each element. For instance, could a lack of expertise alone demonstrate an agency action was novel and extensive? While in almost all cases multiple factors demonstrated a departure from ordinary agency action, in *King v. Burwell*, the IRS' lack of expertise in health care policy alone seemed sufficient.[148] This question will need to be answered, but the dual-element test set out in *West Virginia v. EPA* creates the beginnings of a judicially administrable standard for identifying major questions cases.

[145] *Id.* at 364 (emphasis added) (internal quotation marks omitted) (quoting *West Virginia*, 142 S. Ct. at 2595).
[146] *Id.*
[147] Georgia v. President of the United States, 48 F.4th 1283, 1296 (11th Cir. 2022).
[148] King v. Burwell, 576 U.S. 473, 485 (2015)

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